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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

Mary Laura Brookins & al.,
Petitioners,

versus

South Bend Community School Corporation
& al.

and

United States of America,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The Federal District Court for the Northern District of Indiana refused to process a complaint. The complaint alleged new, intentional, massive, enduring and inter-system discrimination in public education. The Court refused a hearing merely because a wholly independent suit, regarding different facts and to which the Petitioners were not parties, had been brought and settled without evidentiary hearing by the Government, despite the clear statement in the enabling act for the Government, "Nothing in this sub-chapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education" (42 U.S.C. 2000c-8). Is that refusal to even consider the case such a departure from fundamental fairness and the accepted and usual course of judicial proceedings so as to unlawfully abridge the rights of Black and White school children and parents?

2. May a Court of Appeals refuse to rule on an appeal from an ex parte order denying Petitioners the right to prosecute their suit?

3. Did the District Court, as sanctioned by the Court of Appeals, deny the Petitioners fundamental, Constitutional rights in restyling Plaintiffs as Petitioners for Intervention, then effectively staying their proceeding for a year and then denying them intervention by delegating its judicial duties to the defendant Board and refusing to consider either the allegations of the Petitioners or their massive showing of inadequacy of representation inherent in the representative's approval of a school plan which included a segregation program and a breach of public trust? Did the Court of Appeals continue this process in overlooking the Petitioner's resistance to identification as Petitioners for Intervention, in overlooking the Petitioners' allegations that the Defendant representative was effectively incompetent and collusive, in overlooking its own case law, in subordinating manageability to fundamental Constitutional rights, in misapprehending the purpose of Intervention law, in denying the Petitioners' right to make a showing of inadequacy of representation, in overlooking both essential facts and law as regards timeliness, and sanctioning the proceedings of the District Court?

4. Did both the District Court and the Court of Appeals effectively abrogate Rule 24 in this case?

5. Is the decision of the Seventh Circuit barring litigation by the Petitioners regarding discrimination in public education in direct conflict with the decisions of the Fifth Circuit?

6. Did both the District Court and the Court of Appeals act in conflict not only with its previous decisions generally, but also with the law of this case particularly?

7. Has the Court of Appeals effectively decided a federal question in conflict with decisions of this honorable Supreme Court?

8. Has the Court of Appeals effectively nullified the relevant state law condemning waste and constructive fraud?

9. Has the District Court, sanctioned by the Court of Appeals, made an ill-defined umbrella of Federal consent decrees by which illegal conduct may be made immune from examination by any Court?

10. May 42 U.S.C. 1706 and 42 U.S.C. 2000c, the enabling act for the Civil Rights Division, be applied so as to be a wardship act for Black people?

LIST OF ALL PARTIES

Plaintiffs below:

MARY LAURA BROOKINS, Mrs. KATHRYN J.W. BROOKINS, JAMES REILING, Mrs. ELIZABETH REILING, TRICIA RIGGS, Mrs. CAROL WILLIAMS, MARK GLEVA, STEVEN GLEVA, Mrs. KAREN GLEVA, Mr. JOHN C. GLEVA, ROMERIO BROWN, Mrs. JOYCE LUCAS, BRUCE BUTLER, Jr., Ms. TRACIE STAGGERS, and all others similiarly situated.

On 17 September, 1982, the following filed identification of themselves as further named Plaintiffs: TAMEIA JACKSON, Ms. VERNA JACKSON, LAMONT CHATMAN, RAYMOND CHATMAN, Mrs. SANDRA CHATMAN, TYRONE BRADSHAW, and Ms. VANESSA WOMACK.

Defendants below:

SOUTH BEND COMMUNITY SCHOOL CORPORATION, JAMES P. SCAMMAN, Superintendant, THE BOARD OF SCHOOL TRUSTEES OF THE SOUTH BEND COMMUNITY SCHOOL CORPORATION: OSCAR BROOKINS, DONALD W. YATES, HOLLIS E. HUGHES, Jr., LORETTA JACOBSEN, EILEEN BENDER, ANTHONY V. LUBER, WILLIAM L. WILSON, Members of the Board of Trustees (as of 8 September, 1981), and THE UNITED STATES OF AMERICA.

Dr. OSCAR BROOKINS is not represented by counsel in the proceeding.

The Petitioners named the UNITED STATES as a Defendant and duly served them. However, the UNITED STATES never answered.

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS DELIVERED BELOW

No decisions delivered below in the Petitioners' litigation have been reported officially or unofficially. Significant decisions delivered below in the Petitioners' litigation are reproduced in the Appendix. A decision by the Seventh Circuit in the case with which the Petitioners were consolidated and identified as Petitioners for Intervention is reported as UNITED STATES v. SOUTH BEND COMMUNITY SCHOOL CORPORATION 692 F2d 623 (7th Cir., 1982) and is also reproduced in the Appendix attached hereto.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decision of the Court of Appeals for the Seventh Circuit, of which the Petitioners seek review, was entered on June 23, 1983. A timely petition for rehearing, with suggestion of rehearing en banc and a motion for correction of caption were denied on September 7, 1983. This Petition for Writ of Certiorari was filed within ninety (90) days of that date of denial of rehearing and correction of caption.

This Honorable Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVES

Constitution of the United States,

Article III, Section 2.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States,..."

Constitution of the United States,
First Amendment

"Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

Constitution of the United States,
Fifth Amendment

"No person shall be . . . deprived of life, liberty or property without due process of law."

Constitution of the United States,
Fourteenth Amendment

". . . nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

20 U.S.C., Section 1706

"An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief as may be appropriate. The Attorney General of the United States . . ., for, or in the name of the United States, may also institute such a civil action on behalf of such an individual."

20 U.S.C., Section 1708

"The appropriate district court of the United States shall have and exercise jurisdiction of proceedings instituted under section 1706 of this title."

28 U.S.C., Section 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person...

"(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

42 U.S.C., Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

42 U.S.C., Section 2000c-6 (b)

"(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families or their property."

42 U.S.C., Section 2000c-8

"Nothing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education."

FEDERAL RULES OF CIVIL PROCEDURE, RULE 24

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or, (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

STATEMENT OF THE CASE

On September 8, 1981, the Petitioners filed a Complaint in the Federal District Court for Northern Indiana. It was not dismissed for failure to state of cause of action or for want of jurisdiction, nor was it heard. It was not processed.

The complaint alleged that the South Bend Community School Corporation was embarking on a system-wide program of public school discrimination to re-establish a dual system by removing eleven (11) of its twenty-eight (28) grade schools, ten (10) of those eleven (11) being either naturally "racially balanced" or easily made so by cessation of gerrymandering

or otherwise on a substantially neighborhood basis. Ten (10) of those eleven (11) formed a complete ring of stripped service around the major area of Black population and formed areas deprived of neighborhood school service in precisely those well-populated residential neighborhoods connecting urban Black populations to White suburban populations or adjacent White urban populations. The complaint also alleged that the removals were waste and constructive fraud under Indiana Law.

In that the Petitioners asked for a Temporary Restraining Order against a particularly critical grade school removal from a densely populated neighborhood, which was 20% Black (and adjacent to suburban and rural White populations) but gerrymandered to be 59% Black, the Petitioners attached extensive exhibits to their Complaint showing further detailed examples of racial motivation and steering.

The School Corporation answered, moved to dismiss for failure to name the United States as an essential party, and moved that the Complaint be consolidated with a previous case between the United States and the School Corporation. In that previous case the statistical results of a new busing program were approved as describing racial balance, and school closings were summarized as impacting Black and White children proportionately (Hispanics counted as White).

There was no evidentiary hearing. There was no adversary process in that previous case except the prevention of intervention by the NAACP and by a local group. All issues raised by the Petitioners remained unaddressed in the previous case. The Petitioners were not parties to that proceeding.

In their own case the Petitioners added the United States as a Defendant by amended complaint following the School Corporation's answer.

The motion to consolidate and identify as Petitioners for Intervention was granted ex parte.

The Petitioners moved to reconsider. The Petitioners pointed to their allegations and evidence of a new and system-wide segregation plan[1] as showing the inadequacy of representation by the Civil Rights Division.

1. Included in the exhibits was evidence that the school segregation program had inter-district proportions.

The Case was not heard. The showing of inadequacy of representation was not considered or weighed. On September 22, 1982, the District Court denied intervention and dismissed the Petitioners' case. On November 12th, the Court supplemented its order.

From these orders the Petitioners appealed to the Court of Appeals for the Seventh Circuit. The Seventh Circuit sustained the District Court on the grounds that the reality of a cause of action is of no weight in determining the adequacy of previous purported representation, that Petitioners for Intervention may not use evidence to show inadequacy of a representative, and that the Petitioners could prosecute their own suit, but "chose to piggy-back on the Department"[2] whom they named as Defendant.

The Court of Appeals did not address arguments by the Petitioners concerning a broad new discretion given to the Civil Rights Division to make agreements "on behalf of" real parties in interest and then foreclosing them from bringing actions in Federal Court, concerning administrative assumption of effective restraining wardship over Black people and their White residential neighbors, concerning nullification or 42 U.S.C. 2000c-8 and nullification of SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION 402 U.S. 1 (1971), practically and particularly for the Petitioners. The Court of Appeals also denied the Petitioners' Request for correction of a misapprehension of the record, namely, that the Petitioners (never) chose to "piggy-back on the Department."

BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE

In their complaint below, the Petitioners addressed the District Court as follows:

"1. Jurisdiction of this court is invoked under 28 U.S.C. 1343 (3) and (4):

"2. This court has continuing jurisdiction over any and all actions arising from implementation of any plan for desegregation entered into pursuant to a consent agreement incidental to actions brought pursuant to the Civil

2. Decision of June 23 occasioning this Petition for Writ, Appendix, p. 54.

Rights Act of 1964, 42 U.S.C. 2000c-6 (a) and (b) and under the Equal Opportunities Act of 1974, 20 U.S.C., Sections 1701 et sequentes.

"3. This Court has pendant jurisdiction of all claims arising under the common law and statutes of the State of Indiana arising from the implementation of any plan as aforesaid or requiring remedies which are inseparable, as a practical matter, from the subject of orders from this Court."

ARGUMENT

1. Could the District Court properly refuse to process the complaint and could the Court of Appeals lawfully sanction that refusal?

Upon the filing of the Complaint the District Court had the duty to process it. Anything less was a denial to the Petitioners of their right to "due process of law" (UNITED STATES CONSTITUTION, AMENDMENT V), and an interpretation and/or application of Congressional acts so as to bring them into conflict with the Petitioners' right to "petition for redress of grievances" (UNITED STATES CONSTITUTION, AMENDMENT I).

The Courts below refused to process the Petitioners' complaint. Courts may not refuse to do so without violating the most basic law of judicial procedure. Courts are to hear complaints. A Court must process complaints within its jurisdiction. If for reasons of orderliness and directness, the Court wished to simply treat the complaint as a separate suit, such might be the Court's discretion. In that framework the Court might fulfill its Constitutional and statutory duty to process the suit.

> "The appropriate district court shall have *and exercise* jurisdiction of proceedings instituted under Section 1706 of this title." (20 U.S.C. 1708; emphasis added; cf. UNITED STATES CONSTITUTION, AMENDMENT V).

If the Court, however, chose or felt compelled to treat the Complaint as a Petition for Intervention, again for reasons of orderliness (cf. HINES v. RAPIDES PARISH SCHOOL BOARD 479 F2d 762: (5th Cir., 1973)), it was required to observe "scrupulous due process." (ADAMS v. BALDWIN COUNTY

BOARD OF EDUCATION 628 F21 895, 897 (5th Cir., 1980) (Appendix, P.) in an "evidentiary hearing" (Ibid). Inevitably, the Constitutional and statutory requirements would oblige the Court to process the suit, provided it stated a cause of action. "Parental interest . . . in showing the way in which the goal of a unitary system had allegedly been frustrated . . . justifies . . . intervention" (GRAVES v. WALTON 91 FRD 457, 474 (D.C. G.A., 1981), UNITED STATES v. MARION COUNTY SCHOOL DISTRICT 590 F2d 146, 149 (5th Cir., 1979), UNITED STATES v. PERRY COUNTY BOARD OF EDUCATION 467 F2d 277, 279 (5th Cir., 1978). JONES v. CADDO PARISH SCHOOL BOARD 487 F2d 1275, 1277 (5th Cir., 1973) HINES v. RAPIDES PARISH SCHOOL BOARD 479 F2d 762, 765 (5th Cir., 1973).[3] Petitioners stated precisely that interest, and ". . . important Constitutional rights are at stake." (ADAMS v. BALDWIN COUNTY BOARD OF EDUCATION 628 F2d 895, 897 (5th Cir., 1980), Petitioners REPLY BRIEF to the Appellate Court, p. 5)

The Court neither processed the complaint directly as a simple complaint nor indirectly as a petition for intervention. It barred the processing of this suit. It denied the plaintiffs in a Civil Rights Suit access to the Courts and an opportunity to prove to a Federal judge the reality of the "deni(al of) equal protection of the laws" (UNITED STATES CONSTITUTION, AMENDMENT XIV).

Thus, the Court itself violated the Constitutional rights of the Petitioners, effectively denying them their "only opportunity to be heard" (ADAMS v. BALDWIN COUNTY BOARD OF EDUCATION 628 F2d 895, 897 (5th Cir., 1980), cf UNITED STATES CONSTITUTION, AMENDMENT V, BODRIE v. CONNECTICUT 401 U.S. 371, 377-378, 91 S. Ct. 780, 786, 28 L Ed 2d 113, 119 (1971), ARMSTRONG v. MANZO 380 U.S. 545, 552, 85 S. Ct. 1181, 1191, 14 L Ed 2d 62, 66 (1965), MULLANE v. CENTRAL HANOVER TRUST CO. 339 U.S.

3. Rule 24 does not abolish access to Court which is otherwise Constitutionally and otherwise guaranteed. Once basic questions as to the reality of a cause of action, jurisdiction, etc., have been answered in the affirmative the suit must be processed. That it may be most appropriately processed as a granted intervention does not mitigate the statutory and Constitutional guarantees of the processing of a suit, of the right to be heard. This is especially true if the Court itself has required that the Petition for Intervention form (though designed perhaps for another purpose) be used for unquestionably valid and jurisdictionally appropriate causes of action.

306, 313, 70 S. Ct. 652, 656-657, 94 L Ed 865, 873 (1950), HANSBERRY v. LEE 311 U.S. 32, 61 S. Ct. 115, 85 L Ed 22 (1940), GRANNIS v. ORDEAN 234 U.S. 384, 394, 34 S. Ct. 779, 783 53 L Ed 1364, 1369 (1914), WINDSOR, v MCVEIGH 93 U.S. 274, 277, 23 L Ed 914, 916 (1876)).

The Court failed to exercise its Constitutional power (CONSTITUTION of the UNITED STATES, ARTICLE III), its statutory power (20 U.S.C., Section 1708 and 28 U.S.C. 1343) and its unavoidable statutory duty (20 U.S.C. 1708). It necessarily violated 20 U.S.C. Section 1708, which mandated that the Court exercise jurisdiction, and denied the Petitioners' rights described in 20 U.S.C. Section 1706 and 42 U.S.C. Section 1983, guaranteed in 42 U.S.C. Section 2000c-8 and grounded in the Constitution itself.

This abuse was then sanctioned by the Court of Appeals.

The Court of Appeals specifically recognized that the Petitioners had a cause of action,[4] but still sanctioned the District Court's refusal of hearing. Moreover, the Court of Appeals persisted in misapprehending the relationship between the Petitioners and the Civil Rights Division, even though both the School System[5] and the Justice Department Defendants[6] agreed with the Petitioners that the Plaintiff did not choose to "piggy-back on the Department,"[7] but were placed in that position, ex parte, and were left there, a motion to reconsider not withstanding. Moreover, at the Appellate level in the prescribed specific prayer for relief at the close of their Appellate Brief, the Petitioners again asked for relief from this order, this time as an alternate to being granted intervention:

> "The BROOKINS Plaintiffs specifically ask that this Court order that they be granted Intervention on their causes in this case or, in the alternative, that their identification as Petitioners for Intervention be found to be improper."

(The Appellate Court even refused to correct the caption so that the United States, named as a Defendant in the Petitioners'

4. Decision of June 23 occasioning this Petition for Writ, Appendix, p. 54.

5. cf. Infra, p. 18

6. cf. Infra, p. 18

7. Decision of June 23 occasioning this Petition for Writ, Appendix, p. 54.

lawsuit, was shown as Defendant vis-a-vis the Petitioners.)

The Court of Appeals refused to recognize that those not parties to a previous suit could not be excluded by that suit from their day in Court (HANSBERRY v. LEE 311 U.S. 32, 61 S. Ct. 115, 85 L Ed 22 (1940).

The District Court denied the Petitioners the possibility of pursuing the separate case. The Appellate Court sanctioned that denial by its missapprehension of fact and the failure to reverse on the grounds requested in the Petitioners' alternative prayer to that Appellate Court, in fact, failing to rule at all on one of those grounds.

The Petitioners were totally denied meaningful access to the Court. Their exhibits were not weighed or considered. Their complaint was not processed and was arbitrarily put on hold and then obliterated in a process that fundamentally nullified their rights as citizens and the reason for courts in our society.

The first principals of the social compact require that a complaint be processed and heard. It may not be critical what it is called while being processed, but it must be heard either directly or as a granted intervention. The Constitution will tolerate no less.

A gap between law and reality is a tragedy. In so far as members of a society cannot seek remedies for real wrongs in a legal process, the judicial system itself will decay into meaninglessness.

2. May a Court of Appeals refuse to rule on an appeal from an ex parte order blocking the processing of a complaint?

Aside from the focus of Question One, there was a simple refusal of the Court of Appeals to rule on the ex parte order by the District Court of October 13, 1981, on a form of order prepared by the School System Defendants (with the exception of Dr. Brookins). By that order the Court, upon the school system's motion, restyled the Petitioners' Action, a complaint alleging a program of public school segregation and waste of school system resources in order to achieve enduring segregation, as a Petition for Intervention *into a cause no longer pending before the Court.*[8]

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8. Appendix, p. 34. The cause was then on appeal by NAACP and CQE2.

No hearing was had. The Petitioners, by counsel, received a copy of the order in the mail and promptly moved for reconsideration.

As has already been said, in their prayer for relief to the Seventh Circuit, the Petitioners asked alternatively for Intervention or the reversal of the ex parte order identifying them as Petitioners for Intervention. Yet, the Court of Appeals, confronted with this record said: ". . . the appellants could if they had wanted to prosecute their own suit against the School Board. They started down that road, but then decided to piggy-back on the Department." (Decision of June 23, 1983, occasioning this Petition for Writ)

"The Plaintiffs (Petitioners) never decided to piggy-back on the Department, nor did they consent to being piggy-backed by the SBCSC (School System) Defendants or the District Court" (Petitioners' Request for Rehearing, Issue 2). "The Appellate Court overlooked the fact that the Brookins Plaintiffs (Petitioners) assigned their being identified as Petitioners for Intervention as error and specifically asked that their identification as Petitioners for Intervention be found to be improper." (Idem, Issue 3) ". . . it was the School Corporation that originally moved to treat the Brookins complaint as a Petition for Intervention." (Response of School System Defendants to Petition for Rehearing, p. 2) "Appellants' (Petitioners') assertions that the decision to 'piggy-back' their suit on the United States' suit was not theirs, and that they did not consent below to that decision, are correct." (Response of the United States to Appellants' Petition for Rehearing, p. 2) "After finding (that) it was in error for the Brookins Plaintiffs to be piggy-backed on the Department, the Court overlooked applying that law to the District Court which committed that error." (Request for Rehearing, Issue 4).

Consistent with the Appellate Courts' misapprehension, (which omitted a critical portion of the record, and the Courts' failure, even upon Request for Rehearing, to attend to the record as it actually existed) it even refused to correct its own clerical mistake and denied the Petitioners' motion seeking correction of the capiton so that the United States was shown properly as a "Defendant Appellee," not merely as a "Plaintiff-Appellee" (Appendix, p. 57).

An ex parte order remained untouched, and the Seventh Circuit totally refused to rule on an appeal from it, thus further and dramatically violating the Petitioners' rights to "due process" (UNITED STATES CONSTITUTION, AMENDMENT V) and violating the very essence of the Federal Rules of Appellate Procedure, under which the Petitioners perfected an Appeal as of Right. A critical galaxy of facts was misapprehended even after emphasis by Request for Rehearing. A ruling was refused when needed by the Petitioners both for the protection of their fundamental Constitutional rights and for their guidance as to the true state of the law for their city.

3. Was the cumulative effect and interrelationship of the steps taken by both the District Court and the Appellate Court in this case such a denial of fundamental fairness as to call for an exercise of this honorable Court's jurisdiction?

Not only did the District Court, sanctioned by the Appellate Court, and the Appellate Court itself violate Petitioners' fundamental right to be heard at critical points and on critical discreet issues, but, in addition, the pattern in this case sumulates to a particularly egregious and massive violation of the Petitioners' Constitutional rights, a total denial of fundamental fairness.

The District Court identified the Plaintiffs as "Petitioners for Intervention" against the Petitioner-Plaintiffs' wishes, and for practical purposes stayed proceedings for a year.

The Appellate Court sanctioned that step by refusing to correct its misapprehension that the Plaintiffs had chosen to become Petitioners for Intervention, that the Plaintiffs had chosen to "piggy-back" on the Defendant Department.

The erstwhile Plaintiffs, having preserved their record, pointed to the Complaint, now Petition for Intervention, and to the exhibits which displayed a prima facie case of racially motivated public school closures.[9] They further pointed to the

9. Petitioners filed thirty-one (31) exhibits, including a detailed (8'0" square) "geo-coding" of K-6 public school child locations by block on census block data base maps, history of school populations, historical school boundaries and expert opinion from a sociologist specializing in school desegregation behavior. The Petitioners also incorporated by reference the record in COPELAND v. SOUTH BEND COMMUNITY SCHOOL CORPORATION et al. SB67-3803 (D.C. N. Ind., 1968), which they retrieved and made available to the Court and

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total absence of meaningful litigation between the Civil Rights Division and School System[10] and the remarkable absence of a previous record on the issues raised by the Plaintiff-Petitioners for Intervention. The pleading and proof showed the inadequacy of representation by the Civil Rights Division on matters of fundamental Constitutional right to the Plaintiffs.

The District Court brushed past such showing, delegating the responsibility to hear evidence to the Defendant Department[11] and the Defendant School Board[12] and declared that the Court had already found the plan Constitutional in a previous friendly suit between the Justice Department and the School System[13] (although without evidence relevant to the Plaintiff-Petitioners' showing).[14] That is, the Court did not even give a scintilla of consideration to the evidence that the school system was engaged in a new and massive segregation program.

The District Court enforced a consent decree, a contract between the Justice Department and the School System, against the Petitioners, when the Petitioners were clearly

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9. (cont'd.) . . . which showed the consistency of the behavior of the SOUTH BEND COMMUNITY SCHOOL CORPORATION in using site selection and abandonment to achieve racial segregation with a context of dearth of meaningful cartographic information which blunted detection. (cf. FORD MOTOR CO. v. BISANG BROS., 249 F2d 22 (8th Cir., 1957), CLARK v. SANDUSKY 205 F2d 915 (7th Cir., 1953)).

10. cf. Docket Sheets for S80-35 (Appendix, pp. 57 - 69).

11. "The question of adequacy of representation does not depend upon the Court's assessment of the representative's decision," (Memorandum and Order of September 22, 1982, in S81-313/S80-35, p. 5, Appendix, p.) (cf. Proposed Consent Order as submitted April 3, 1981, in S80-35, in which the United States stated that its decision was "on the basis of information supplied by the School System" as noted by Petitioners in their Reply Brief to the Appellate Court, p. 4.)

12. "School Board and the administrators . . . have also fully and fairly considered those interests" (Memorandum cit., p. 6, Appendix, p. 50) "The Brookins Class had has its day before the Board of School Trustees" (Idem, p. 7, Appendix, p. 50).

13. Referring to Order of April 17, 1981, "This Court has already determined that the plan was Constitutional based on evidence and information submitted to aid the Court in making that determination" (Ibid, p. 7, Appendix, p. 49).

14. The Docket shows no evidentiary hearing whatsoever. Appendix, pp. 59 - 69. The full record of S80-35 must be seen for assessment of the extent of void of meaningful evidence.

alleging and ready to show that the contract violated the law (cf. KELLY v. KOSUGA 358, U.S. 516, 520, 79 S. Ct. 429, 431, 3 L. 2d 475 (1959), HANSBERRY v. LEE 311 U.S. 32, 61 S. Ct. 115, 85 L Ed 22 (1940)). The District Court engaged in this enforcement in violation of the law, not only refusing to process the Petitioners' suit alleging such violation, but also, refusing to consider Petitioners' proferred showing that such violation must be the result of an inadequacy of representation.

As has been shown, the Appellate Court, having said that the Petitioners could have filed their own case if they wanted to,[15] refused to correct its misapprehension and acknowledge that the Petitioners did want to.

The Court of Appeals, even upon emphasis in Request for Rehearing, overlooked the Petitioners' resistance to identification as Petitioners for Intervention; overlooked the Petitioners' allegations that the Defendant representative was effectively incompetent and collusive; overlooked its own case law; subordinated manageability to fundamental, Constitutional rights; misapprehended the purpose of intervention law; denied the Petitioners' right to make a showing of inadequacy of representative; overlooked both essential facts and law as regards timeliness; and failed to recognize that the Petitioners had named the United States as a Defendant.[16]

The Appellate Court refused to rule on their prayer for relief from being designated as Petitioners for Intervention and their being denied direct prosecution of their suit.

Then, even when they had presented compelling arguments and evidence within their court designated roles, they were still denied fundamental fairness and due process with novel proposed law.

The Appellate Court, while acknowledging "superficial appeal" in the logic of the Petitioners' showing of inadequacy, sanctioned the District Court's denial of due process by declaring that the Petitioners were prohibited from making their showing until after they had been granted intervention, which in turn, depended upon their having made the showing.

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15. Appendix, p. 54.

16. Request for Rehearing, Issues 1, 2, 3, 4, 5, 8, 9, 10, 12, 13, 14, & 15.

The Fifth Circuit does not permit such denial of due process (ADAMS v. BALDWIN COUNTY BOARD OF EDUCATION 628 F2d 895, 897 (5th Cir., 1980)). This Honorable Court itself has repeatedly held that the Constitution requires a hearing at a meaningful time and in a meaningful manner. (BODRIE v. CONNECTICUT 401 U.S. 371, 377-378, 91 S. Ct. 780, 786, 28 L Ed 2d 113, 119 (1971), ARMSTRONG v. MANZO 380 U.S. 545, 552, 85 S. Ct. 1181, 1191, 14 L Ed 2d 62, 66 (1965), MULLANE v. CENTRAL HANOVER TRUST CO. 339 U.S. 306, 313, 70 S. Ct. 652, 656-57, 94 L Ed 865, 873 (1950)). This Constitutional requirement has led this Court to require that a case be considered anew, *even when the same real party in interest has been in Court* (ARMSTRONG v. MANZO, loc. cit., cf. HANSBERRY v. LEE, loc. cit.). A fortiore, someone who *has never been made a party* to a previous perfunctory process has a right to a meaningful hearing appropriate to this case disposing of fundamental rights (MULLANE v. CENTRAL HANOVER TRUST CO., loc. cit.).

"The fundamental requisite of due process of law is the opportunity to be heard." GRANNIS v. ORDEAN 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L Ed 1364, 1369 (1914), cf. WINDSOR v. MCVEIGH 93 U.S. 274, 277, 23 L Ed 914, 916 (1876)).

In direct collision with fundamental law, the Seventh Circuit has told Petitioners that they had no right to a hearing. The Court of Appeals has acted ". . . contrary to the first principles of the social compact and the right administration of justice, MCVEIGH v. UNITED STATES, II Wall., 267 (78 U.S., XX., 81)" (Idem 93 U.S. 274, 277, 23 L Ed 914, 915 (1876)).

4. Was Federal Rule of Civil Procedure 24 effectively abrogated in this case?

Intervention law itself was not respected in this case.

Rule 24 (a) (2) provides that intervention is "as of right" when, inter alia, the interest of the applicant is, "as a practical matter," not adequately represented by the existing parties. Frequently, this has been found to impose a requirement that the applicant show inadequacy of representation. "Rule 24(a) (2) . . . makes inadequacy of representation an absolute requirement . . ." (Appendix, p. 54). ". . . if the decree is as bad as they say it is, their interests are not being adequately rep-

resented by the Department." (Decision of June 23, 1983, occasioning this Petition for Writ as quoted in Request for Rehearing, p. 10, Appendix, p. 54). ". . . the District Court could not determine whether it was as bad as they say it is without granting them a hearing." (Idem, p. 54).

Therefore, Rule 24, as well as due process, requires the opportunity for a threshold hearing, as is explicated in the only other decision in the country precisely on this point. (ADAMS v. BALDWIN COUNTY BOARD OF EDUCATION 628 F2d 895, 897 (5th Cir., 1980), Appendix, p. 69).

The only practical way for the Petitioners to show an inadequacy of representation was by showing illegal results damaging to the Petitioners and consented to by the Department. This is in a case in which there is no evidence that the Department has undertaken independent investigation or considered the position of the BROOKINS CLASSES and has continuously acted in apparent harmony with the School System Defendants in resisting adjudication on the merits. The record shows a total conflict of interest between the Petitioners and the United States as to the Petitioners "interest in . . . showing" (GRAVES v. WALTON SCHOOL DISTRICT 91 FRD 457, 474 (D.C. Ga., 1981) and prior Fifth Circuit cases) the frustration of the goal of a unitary system.

Whether or not representation is inadequate is a question of fact. Inadequacy of representation, therefore, can only be shown by an evidentiary hearing or, if the Courts indicate that such is a sufficient showing for this purpose, by affidavits and exhibits, though even then a hearing would be appropriate. If a Petitioner for Intervention is forbidden absolutely to make such a showing before being allowed to intervene as of right and such is a prerequisite for that intervention, he or she will *never* be able to achieve intervention as of right.

Intervention as of right would truly be effectively abolished by this decision of the Seventh Circuit. The Seventh Circuit has no authority to take such a radical step.

5. Does the present decision by the Seventh Circuit pose a serious conflict between the Circuits?

It is not necessarily wrong that litigants in one part of the United States process a case in a different manner than litigants

in another. It is wrong to judicially combine the two methods in such a way as to prevent the processing of litigation, to abrogate due process. That is what the Seventh Circuit has done.

The Court of Appeals for the Seventh Circuit states in this decision that, "the Appellants could if they had wanted, prosecuted their own suit against the School Board" (Decision of June 23, 1983, occasioning this Petition, Appendix, p. 54). Thus the Seventh Circuit (notwithstanding its misapprehension of the record noted above) is in conflict with a long held position of the Court of Appeals for the Fifth Circuit, which requires Intervention as the means of redress for those situated as are the Plaintiffs (e.g., HINES v. RAPIDES PARISH SCHOOL BOARD 479 F2d, 762 (5th Cir., (1973), ADAMS v. BALDWIN COUNTY BOARD OF EDUCATION 628 F2d 895 (5th Cir. 1980).[17]

One Circuit requires that litigation over school segregation[18] be carried on by a Petition for Intervention while another Circuit requires that it be carried on by a separate suit.

It is, however, intolerable that the Court of Appeals, receiving an Appeal from litigants who are required (unless the Court give them relief to the contrary) to proceed as Petitioners for Intervention (as if they were under Fifth Circuit law) then conflicted with the Fifth Circuit on the Fifth Circuit's insistence both that "parental interest . . . in showing the way in which the goal of a unitary system and allegedly been frustrated . . . justifies invervention" (GRAVES v. WALTON SCHOOL DISTRICT 91FRD 457, 474 (D.C., Ga., 1981)) and that "when parents seek to intervene in school desegregation cases, the important Constitutional rights at stake demand a scrupulous regard for due process considerations. . . (Including an evidentiary hearing)" (ADAMS v. BALDWIN COUNTY BOARD OF EDUCATION 628 F2d 895, 897 (5th Cir., (1980)).

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17. It has already been pointed out that in this case the Petitioners could not prosecute their suit. The District Court did not cite law as the basis for preventing the Petitioners from prosecuting "their own suit," though it was aware of Fifth Circuit decisions (e.g., HINES v. RAPIDES PARISH).

18. That the segregation is carried out under the umbrella of a consent decree does not render the racial segregation less real or less justiciable, especially when the decree is based on perfunctory entries with all evidence prepared by the Defendant school system. (cf. GRAVES v. WALTON 91 FRD 457, 459 (D.G. Ga., 1981), ADAMS v. BALDWIN COUNTY BOARD OF EDUCATION 628 F2d 895 (5th Cir., 1980), UNITED STATES v. MARION COUNTY SCHOOL DISTRICT 590 F2d 146, 149 (5th Cir., 1979)) and prior Fifth Circuit decisions cited in Petitioners' Issue one above.

The Seventh Circuit has combined two methods of processing a suit so as to block processing of the Petitioners' suit. *It has adopted the Fifth Circuits' method as a practical matter by refusing to rule on the Petitioners' appeal from being decreed by the District Court to be Petitioners for Intervention.* Then, while formally requiring them to proceed in the manner in which they had been positioned by application of Fifth Circuit law below, it refused to apply the whole of Fift Circuit law so as to save Petitioners' fundamental rights.

That is precisely the core of the succinct and important decision of the Fifth Circuit in the ADAMS case. Once the Fifth Circuit had decided that intervention would be the vehicle by which parents would vindicate the rights of their children in a case such as ours that Circuit also, necessarily, surrounded such process with the protections appropriate for any lawsuit, particularly, one by parents, generally of limited means, against governmental racial discrimination. Consistently, the Fifth Circuit has refused to entertain political questions, purported lawsuits or petitions for intervention which did not state a cause of action, while repeatedly pointing to an interest which justifies intervention, interest in showing the way in which the goal of a unitary system had been frustrated. Having required the route of intervention, in effect, it made Rule 12 a measure of the resulting petitions and, as a practical matter, treated petitions with the respect or practical dismissal accorded separate suits. They could not do otherwise without denying Petitioners, stating true causes of action, their rights under the Fifth and Fourteenth Amendments and various statutes as well as, in cases where the United States was the initial party, rights under the First Amendment.

Consistent with that underlying law, the Circuit also found, in effect, that since violations of Civil Rights give rise to a cause of action each day that the violation is perpetrated, nine years could not be untimely for the granting of intervention to parents whose interest was a unitary school system (ADAMS v. BALDWIN COUNTY BOARD OF EDUCATION 628 F2d 895 (5th Cir., 1980)).[19]

19. Timeliness is not a true problem. "Courts have allowed intervention months or even years after the original filing of the suit where the substantial litigation of issues had not been commenced (litigation on the facts has been totally absent between the UNITED STATES and the SBSCSC. All litigation has been to keep Petitioners for Intervention or separate Plaintiffs out) when the motion to intervene was filed" (SMITH v. MONSANTO 420 F2d 1103, 1115 (5th Cir., 1970). "In school desegregation proceedings, intervention and withdrawal of

(cont'd. next page)

Yet, the Seventh Circuit dealing with Court created intervenors to whom they refused relief on appeal from such creation, hold that the requirement of reality of a cause of action was of no more weight than "an observation" (Decision of June 23, 1983, occasioning this Petition for Writ, Appendix, p. 54) or *presumed* that causes of action would be stated in bad faith (Ibid), and brushed aside the Petitioners. complaint even though it stated a cause of action in detail and incorporated a mass of exhibits showing the reality of the segregation scheme.

The Seventh Circuit also sanctioned the District Courts' total refusal to consider and, the exhibits which showed the inadequacy of a representative, who consented to a segregation plan and resisted its examination of the complaint alleging such consent and plan. Thus, it partially adopted the procedure of the Fifth Circuit by refusing to review the ex parte order, but then destroyed the raison d'etre for that procedure, due process for citizens and judicial ability to examine alleged frustration of the goal of a unitary system.

There is no way to reconcile the position of the Fifth Circuit and that of the Seventh Circuit on these matters.

Either the District Court's identification of the Complaint as a Petition for Intervention must be reversed leading to a benign conflict between the Circuits, or the whole of the Fifth Circuit law, including identification of the interest which justifies

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19. (cont'd) . . .parties should be fully granted as long as it does not seriously interfere with actual hearings" (DOWELL v. BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS 430 F2d 865 (5th Cir., 1970). To require Black parent to catch the segregationist character of "complicated" and complicated "socio-legel plans" (SBCSC Brief to Appellate Court, p. 21) by stopwatch makes a mockery of due process and here ignores that the record showed that Petitioner, Kathryn J. W. Brookins, was first importuning the Justice Department and then seeking private counsel months before April 17, 1981, and, with others, had some reason to hope for a source thereafter of effective representation from the NAACP. cf. above, Issue 3. Besides, the Petitioners, all along, wanted to proceed with their own suit.

It is significant that the Justice Department, once the Petitioners filed their complaint, rather than expressing the slightest interset in the Petitioners' allegations, joined with the School System in preventing the hearing of evidence supporting those allegations, and urged the District Court to delay for months even the issuance of procedural rulings, thus imposing a massive delay on actual hearing of the Petitioners' litigation over current violations of their Civil rights. There was no evidentiary proceeding to be duplicated. There were no pending hearings to be interfered with. There was only the uncovering of an alleged segregation program.

intervention and identification of the need for scrupulous due process must be applied. In the second alternative the law of the Fifth Circuit must prevail because the decision of the Seventh Circuit is so repugnant to the Constitution.

6. Did the District Court and the Court of Appeals act in conflict with both the law of the case and its own case law without reasoned development?

This question poses the same substantive issues as the previous questions, but in the framework of the Seventh Circuits' conflict with its own case law and even with its law of the case.

On 28 July, 1982, the Court of Appeals for the Seventh Circuit, affirming the District Court's denial of intervention to the NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE in UNITED STATES v. SOUTH BEND COMMUNITY SCHOOL CORPORATION et al., took a position in substantial harmony with the Fifth Circuit over dismissability for failure to state a cause of action. "The NAACP has not attacked the proposed desegregation plan as Constitutionally or otherwise inadequate and has merely suggested improvements. A consent decree of this nature need not contain a perfect plan but only one that is 'not unconstitutional, unlawful, . . . contrary to public policy, or unreasonable.' UNITED STATES v. CITY OF MIAMI 614 F2s, 1322, 1333 (5th Cir., 1980). *Therefore,* the NAACP's supposed improvements for the plan do not require its intervention." (UNITED STATES v. SOUTH BEND COMMUNITY SCHOOL CORPORATION et al 692 F2d 623, 628 (7th Cir., 1982), emphasis added).

The Court went on in a footnote to separate out NAACP's attach *in intervention* on the secession of all White, North Liberty Township from the South Bend school system in the Fall of 1980 as not part of the consent decree of April 1981, and so irrelevant for the purpose of adding gravity to the NAACP's complaint in intervention (Ibid., No. 5).[20] The Court was clearly concerned with emphasizing the absence of a justifiable intervention.

20. Whether the Court was correct in so ding might have been doubted. The SBCSC task force to develop a desegregation plan may have been triggered by the State of Indiana's concern over a proposal for a new, all White, grade school in North Liberty made by SBCSC in 1978. The initial consent decree in UNITED STATES v. SBCSC et al. (February 8, 1980), which adopted the language of the task force, was made at a time that North Liberty was part of SBCSC. No judicial leave to secede was granted, but by the time that the purported desegregation plan (a temporarily enforced busing plan) was decreed on April 17, 1981, North Liberty was out of the picture.

Yet, a year later, in the same case (by reason of consolidation and identification as Petitioners for Intervention) the same Court told the Petitioners that the, "quoted statement was an observation, not a holding" (Decision of June 23, 1983, occasioning this Petition for Writ) in spite of the fact that the statement was pivotal in denying intervention to the NAACP in the previous decision and was the necessary minor premise in the syllogism by which the Court kept the NAACP out. (The major premise was the identification of "that interest which justifies invervention," found in parallel Fifth Circuit decisions so similar to the law of dismissability for failure to state a cause of action.)

The Petitioners in September of 1981 had attacked the plan as Constitutionally the otherwise inadequate, as contrary to public policy and unreasonable. Under the law of the case itself the Petitioners should have been granted intervention.

This conclusion is reinforced in the context of the Seventh Circuit's broader law, which can be harmonized with broader due process requirements. The Petitioners emphatically alleged a situation in which the purported representative, the Justice Department, had "fail(ed) in the fulfillment of (its) duty," (UNITED STATES v. BOARD OF SCHOOL COMMISSIONERS OF INDIANAPOLIS, IND. et al. 466 F2d 573, 575 (7th Cir., 1972) had acted in *practical* collusion with the School System (Ibid) and had, on the record, acted with uninterrupted adversity to the Petitioners' interest in getting the facts, which appeared to show a massive segregation scheme, before the Courts which was the only practical forum for redress available to the Petitioners (Ibid).

7. Has the Seventh Circuit effectively nullified the holdings of this Honorable Court in SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION 402 U.S. 1, 20-21, 91 S. Ct. 1267, 1278-79, 28 L Ed 2d 554, 569-70 (1971)) for the people of South Bend, Indiana?

Evil is the absence of a required good. The newly created and invidious absence of public grade schools from effectively racially balanced urban neighborhoods, some of them growing in population, coupled with the persistence of public grade schools in heavily White or heavily Black neighborhoods, some of them falling sharply in population, and coupled with a long range plan for building new public grade schools in suburban

White neighborhoods (in harmony with current building by an adjacent White school corporation) is absence of a required good.[21]

Therefore, the school removal program of the SBCSC is evil, more particularly, a Constitutional evil.

This Court has found that one of the most potent forms of racial discrimination used by public school systems since BROWN is locking in "separation of the races by racially motivated steering programs creating or aggravating the polarity between White suburbs, (which had ceased to grow around South Bend prior to the school removal plan, while integrated urban neighborhoods were growing) and Black urban populations (SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION 402 U.S. 1, 21, 91 S. Ct. 1267, 1278, 28 L Ed 2d 554, 569 (1971)).

This Court has condemned the selection of sites for schools "that had the forseeable and anticipated effect of (renewing and deepening) . . . the racial separation of the schools" COLUMBUS BOARD OF EDUCATION v. PENICK 443 U.S. 449, 462, 99 S. Ct. 2941, 2949, 61 L Ed 2d 666, 680 (1979)) (1981) and the formation of discriminatory clusters of schools aggravated by the inclusion of Hispanics, who are for Court purposes labelled "White" by the School system (KEYES v. SCHOOL DISTRICT NO. 1, DENVER, COLO. 413 U.S. 189, 195-198, 93 S. Ct. 2686, 2691-2693 37 L E2d 548, 556-557 (1973)).

Lower Courts have otherwise condemned not only the unnecessary closing of racially integrated schools, but also the failure to build them (CLARK v. BOARD OF EDUCATION OF LITTLE ROCK 449 F2d 493, 499 (8th Cir., 1971). Certiorari denied 405 U.S. 936 92 S. Ct. 954, 30 L Ed 2d812

21. We remind the Court that the Petitioners tendered evidence that the adjacent, almost totally White public school systems were transferring Black students out of their almost all White schools and into the schools of the Defendant South Bend system, with the Defendant system's knowledge and apparent cooperation. All exhibits were responded to with silence and uniform resistance to presentation or consideration, except for the Appellate Court's identification of the Petitioners' contention, "if the decree is as bad as they say it is, their interests are not being adequately represented by the Department." (Decision occasioning Petition for Writ, Appendix, p. 54). No known follow-up investigation has been made by the Civil Rights Division; it has only resisted evaluation of this evidence by a Court.

(1972), UNITED STATES v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS 494 F2d 81, 87 (7th Cir., 1973) certiorari denied 413 U.S. 920, 93 S. Ct. 3066, 37 L Ed 21 1041 (1973), MCPHERSON v. SCHOOL DISTRICT NO. 186, SPRINGFIELD, ILLINOIS 426 F. Supp. 173, 188 (S.P. 111., 1976), PENICK v. COLUMBUS BOARD OF EDUCATION 429 F. Supp. 229, 240-241, 252-254, 255, 259 (S. D. Ohio E. D., 1977) UNITED STATES v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS 506 F. Supp. 657, 671 (S.D. Ind., 1979), cf. BRADLEY v. MILLIKEN 460 F. Supp. 299, 310 (E. D. Mich. S. D., 1978)).

These matters are being kept out of the District Court of appropriate jurisdiction and every effort is being made to render the people of South Bend unable to achieve a legal remedy in spite of the clear mandate of this Court: "In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is . . . a factor of great weight." (SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION 402 U.S. 1, 21, 91 S. Ct. 1267, 1278, 28 L Ed 2d 554, 569 (1971)).

While citizens watch SWANN behavior unfolding in high speed before them, they are prevented from bringing it to a Court's attention, a Court which has not had the advantage of an adversarial presentation of evidence, and so the law of this land is rendered a mere phantom for them.

8. May Federal Consent Decrees be used to foreclose true and valid state causes of action?

The Petitioners alleged that, while the school removal program of the school system appeared flawlessly supported by facts if enduring segregation was its end, otherwise it was "arbitrary and capricious in that it was not supported by facts or a reasonable attempt to ascertain the facts." (VIGO COUNTY COMMUNITY SCHOOL CORPORATION v. CROCKETT 307 NE 2d 510, 512 (1974)).

Since, the Federal District Court appeared to assume pendant jurisdiction over the re-organization plan, as well as the temporary busing and teacher hiring and workshops which were the purported desegretaion plan, the reorganization plan is apparently insulated from attack the state law of governmental waste. This was not considered by the Court or by the purported representative.

9. Does the decision create a more far reaching umbrella shielding illegal conduct from judicial examination?

While the Petitioners noted above the shielding of a school system from examination for wasteful and constructively fraudulent school disposals and segregationist engineering, the decision will invite broader use of such manuevers in other areas unless the decision is sharply limited.

The greater judicial economy is not in limiting a bad decision, but in reversing it.

10. Is the Civil rights Act an act declaring Black people legally incompetent and wards of the Justice Department in all of those situations in which the Department chooses to act on their behalf?

Obviously, the answer to this question must be, "no," but, necessarily, the Court of Appeals has treated the position of the Justice Department vis-a-vis the Black Petitioners as if the answer was, "yes." (Their White fellow Petitioners, who complain of the waste visited upon them in the school system's vigorous effort to lock in future segregation and steer White families away from their Black neighbors, have had their waste claims made parallel matters of administrative wardship, even though the Justice Department denies concern for those claims.)

The Civil Rights Act was never intended to be applied as a wardship act keeping Black parents out of Court. It was passed because those wishing to block desegretaion were keeping Black parents out and harrassing their organizations. (cf. U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS, 88th Congress, 2nd Session, 1964, p. 2507). It would be truly ironic if that act now became the vehicle for case law that renders organizations of Black people meaningless and formally excludes Black parents and public school children from even their minimum day in Court when they seek to block a public school segregation program.

The plain text of the Act prohibits the pre-emptive position of the Department, which the Court of Appeals seeks to enshrine as law in the current decisions.

"Nothing in this subchapter shall adversely affect the right of any person to sue for or obtain relief in any Court against

discrimination in public education." (42 U.S.C. 2000c-8).[22]

To apply 42 U.S.C. 1706 ff. or 42 U.S.C. 2000c in collision with 42 U.S.C. 2000c-8 not only tortures the letter of the law and its legislative history, but effectively has Congress passing a law denying the Plaintiffs their right to petition for redress of grievances.

CONCLUSION

Racial segregation has been one of the most pervasive and damaging evils to infect our Nation's life. Its institutionalization in such broad reaching programs as that described in SWANN or that described by, and documented by, the BROOKINS Plaintiffs is particularly pernicious and dangerous.

This has been a major object of concern for the Federal judiciary. Certainly stopping new state action along these lines is a most minimal and basic effort within that concern.

What the Court has done is overlooked that concern and foreclosed access to the Federal Courts for Black people and others in South Bend, Indiana, on this issue.[23] Surely, the Court of Appeals could not have meant such an effect.

Yet, unless this Honorable Court grants certiorari here, such is apparent the effect in this case, whatever new litigation may be filed to test the true meaning of the decision.

Even more fundamental, however, is the practical effect of a Court's refusal to process a complaint. Without a right to be heard, citizens are denied the reality of a judicial system and the fabric of law becomes meaningless for them.

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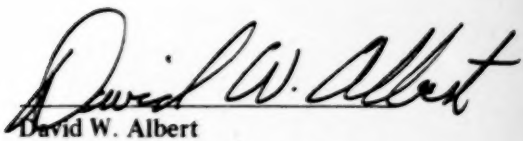
22. While of minor, even petty, scale, the Petitioners note that they are ordered to pay $49.50 in costs to the United States in spite of the language of Federal Rule 39 (b) . . . "costs shall not be awarded for or against the United States." This further petty burden takes on significance in light of 42 U.S.C. 2000 c-8.

    This subsection may also create an unconditional right to intervene under FRCP (a) (1).

23. Petitioners remind this Court of their grant of Writ of Certiorari to the Supreme Court of Illinois and its decision in HANSBERRY v. LEE 311 U.S. 32 (1940), which laid to rest a parallel means of excluding Black people from Court fourteen years before this Court's decision in BROWN. Actual access to a Court by the real parties in interest is a necessity for the vindication of Civil Rights; conversely, removal of that access is one of the most effective ways of permitting new state action in conflict with Civil Rights.

Therefore, the Petitioners urgently ask this Court for a Writ of Certiorari to the Seventh Circuit on this case and access to the Courts for their cause of action.



David W. Albert
19271 Darden Road
South Bend, Indiana 46637
(219 - 272-1892),
Attorney for the Petitioners

APPENDIX

A. ORDER CONSOLIDATING PETITIONERS' SUIT WITH S80-35 AND PURPORTEDLY MAKING IT INTO A PETITION FOR INTERVENTION

Filed: October 13, 1981
Richard E. Timmons, Clerk
U.S. District Court
Northern District of Indiana

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CIVIL NO. S 81-0313

MARY LAURA BROOKINS, et al.,
Plaintiffs

v.

SOUTH BEND COMMUNITY
SCHOOL CORPORATION, et al.,
Defendants

ORDER

Pursuant to the Motion to Consolidate and Consider Complaint as Petition to Intervene filed by the defendants, it is hereby ORDERED that this action is consolidated with the case of United States of America v. South Bend Community School Corporation, et al., Civil No. S 80-0035, presently pending in this United States District Court.

It is further ORDERED that the complaint in this action is hereby deemed and considered for all purposes as a petition to intervene in Civil No. S 80-0035 pursuant to Rule 24 of the Federal Rules of Civil Procedure.

Dated this 13 day of October, 1981.

Allen Sharp
Judge, United States District Court

cc: USA
D. Albert
F. Morse II
D. Schabel
K. Fedder
T. Atkins
M. Reed

B. DECISION OF COURT OF APPEALS FOR SEVENTH CIRCUIT IN S80-35

UNITED STATES of America,
Plaintiff-Appellee,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Defendants-Appellees,

and

Clay Quality Education II, Inc. and South Bend Branch of the National Association for the Advancement of Colored People, Proposed Intervenors, Appellants.

Nos. 81-1792, 81-2062.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 18, 1982.
Decided July 28, 1982.*
Opinion Oct. 14, 1982.

On motions to intervene in school desegregation case, the United States District Court for the Northern District of Indiana, South Bend Division, Allen Sharp, Chief Judge, denied motions, 511 F. Supp. 1352, and proposed intervenors appealed. The Court of Appeals, Cummings, Chief Judge, held that:

(1) students' interests that parents' not-for-profit corporation sought to represent were already adequately represented by school board, which was charged by law with representing interests of students, and thus parents' corporation was not entitled to intervene as of right; (2) since national organization which sought to represent all black students in school district and their parents had not shown inadequate representation by the government, which had same ultimate objective, and since it had not attacked proposed desegregation plan as constitutionally or otherwise inadequate, organization's supposed improvements for plan did not require its intervention; and (3) national organization was not entitled to permissive intervention.

Affirmed.

*This appeal was originally decided by unreported order on July 28, 1982. On motion of defendants-appellees, this Court has decided to publish our July 28, 1982, order of affirmance as a citable opinion.

1. **Federal Civil Procedure 331**

Since adequate representation of students had to be presumed in absence of showing of gross negligence or bad faith on part of school board, which was charged by law with representing interests of students, and since it had not been shown that school board did not fairly consider interests of students in deciding to agree to consent order in school desegregation case, not-for-profit corporation, which sought to represent parent members' children and all other students in school system, was not entitled to intervene as of right to challenge consent order. Fed. Rules Civ. Proc. Rule 24(a), 28 U.S.C.A.; IC 20-5-2-1 (1982 Ed.).

2. **Federal Civil Procedure 331**

Where national organization which sought to represent as of right all black students in school district and their parents and government had same ultimate objective in school desegregation case and where there was no showing of gross negligence or bad faith on part of government or collusion, inadequate representation by government was not shown and thus organization's supposed improvements for desegregation plan, which was not attacked as constitutionally or otherwise inadequate, did not require its intervention as of right. Fed. Rules Civ. Proc. Rule 24(a), 28 U.S.C.A.

3. **Federal Civil Procedure 331**

Where intervention by national organization which sought to represent all black students in school district and their parents would have delayed desegregation proceedings and prejudiced defendants' ability to open desegregated school system in fall of 1981, organization's motion for permissive intervention was properly denied. Fed. Rules Civ. Proc. Rule 24(b) (2), 28 U.S.C.A.

Donald A. Schabel, Indianapolis, Ind., Tresa Demachak, N.A.A.C.P., New York City, for proposed intervenors, appellants.

Franklin A. Morse, II, Thornburg, McGill, Deahl, Harman, Carey & Murray, South Bend, Ind., for defendants-appellants.

Louise Lerner, Civ. Rights Div., Dept. of Justice, Washington, D.C. for plaintiff-appellee.

Before CUMMINGS, Chief Judge, BAUER, Circuit Judge, and DOYLE, Senior District Judge.**

CUMMINGS, Chief Judge.

The United States filed this suit in February 1980 against the South Bend Community School Corporation, its superintendent, its Board of School Trustees and the 7 members thereof alleging that defendants had engaged in various acts of discrimination with the intent and effect of segregating students and faculty on the basis of race in the South Bend, Indiana public school system. The suit was brought under Section 407 of Title IV of the Civil Rights Act of 1964 (42 U.S.C. 2000c-6) and Section 207 of the Equal Educational Opportunities Act of 1974 (20 U.S.C. 1706). The Government sought an injunction prohibiting defendants from discriminating on the basis of race or color in operating the schools within territory served by the South Bend Community School Corporation and requiring defendants to develop and implement a desegregation plan which would remove "all vestiges of prior discrimination."

The district court, simultaneously entered a consent order submitted by the parties and calling for defendants to develop and implement a desegregation plan for student assignments by the beginning of the 1981-1982 school year. 511 F.Supp. 1352. The crux of the plan was to provide that black students in each school would be within 15% of the total percentage of black students in the school system. The plan was also to ensure that student transportation or school closings would fall equitably on all racial groups. Faculty assignments were to be adjusted by the beginning of the 1980-1981 school year so that the faculty of each school would reflect the racial composition, teaching experience and teaching disciplines of the faculty as a whole. The plan was also to provide for ancillary relief with respect to staff training, curriculum evaluation and revision, equal quality facilities, and substantially equal discipline practices.

Under the consent order, the school board developed a new faculty assignment plan, which went into effect at the beginning of the 1980-81 school year. In addition, the school board enlisted community support for the development of its new

**The Honorable James E. Doyle, Senior District Judge for the Western District of Wisconsin, is sitting by designation.

student assignment plan. A Citizen's Advisory Committee was formed, and over 300 citizens, many of them residents of Clay Township, volunteered to serve on subcommittees. Subcommittees met over 150 times between February and December 1980, and nearly 200 people actively participated in the meetings. All meetings were open to the public and were given extensive newspaper publicity. The subcommittees' recommendations were subsequently reported to the school board by the Citizen's Advisory Committee.

In the meantime, the school board's planning team formulated a number of alternative desegregation plans during the fall of 1980, and in late November decided on a recommended plan. This process was given extensive local media coverage, and, on December 17, 1980, the precise details of the proposed plan were made available to the public and the media in printed form and were aired on the local public television station. During the months of December 1980 to February 1981, the school board held a dozen special meetings devoted solely to the plan. The meetings were heavily publicized in school newsletters as well as in the local news media, and all citizens were invited to speak at the meeting and were encouraged as well to submit written comments. Throughout this process, the school board made it known to the public that it was operating on a timetable which required implementation of a desegregation plan by the beginning of the 1981-82 school year.

At the conclusion of these proceedings, during a meeting on February 26-27, 1981, the Board of School Trustees passed a resolution adopting a desegregation plan for student assignments. On February 27, 1981, the parties to this suit submitted to the district court a proposed consent order incorporating the plans. The plan was subsequently revised, resubmitted to the district court on April 3, 1981, and was adopted by that court on April 17, 1981. The validity of the plan is not before us.

On February 26, 1981, the day before the parties hereto first submitted to the district court the proposed consent order incorporating the desegregation plan, appellant Clay Quality Education II, Inc. (Clay) sought leave to intervene as a defendant. Clay is an Indiana not-for-profit corporation whose members are parents of children in the South Bend school system. Clay seeks to represent its members' children and all other students in the school system. If Clay's intervention were granted, it planned to request the district court to vacate the first consent order because there was no finding by the court

or admission by the defendants of a constitutional violation. Clay said it would also answer the Government's complaint by denying any intentional racial discrimination and would file a cross-claim contending that defendants' "dismantling of the neighborhood school system deprived students and their parents of liberty and property without due process of law." Subsequently Clay contended that the district court had no subject matter jurisdiction.

Four days after the desegregation plan was submitted to the district court, the South Bend Branch of the National Association for the Advancement of Colored People (NAACP) also sought leave to intervene, but as a plaintiff. It sought to challenge the desegregation plan on behalf of black children in the school district and their parents. It also sought to challenge the transfer of students in North Liberty Township, an all-white area, from the South Bend school system to an adjoining all-white school system. This transfer had been approved by the school board after the entry of the initial consent order in 1980.

Judge Sharp held a hearing on the motions to intervene on March 5, 1981. The Government and defendants opposed intervention by Clay and the NAACP. However, in an attempt to resolve the NAACP's objections to the consent decree, the parties subsequently met with it. This resulted in the submission of a revised consent decree on April 3, 1981, and, as noted, it was this revised decree that was entered by the district court on April 17, 1981.

In the memorandum and order entered on April 17, 511 F. Supp. 1352, the district court *inter alia* denied the NAACP's and Clay's motions to intervene. As the court noted, the defendants opposed the NAACP's intervention on the grounds that it was adequately represented by the Attorney General of the United States and that its application was untimely.

Judge Sharp stated that this Court had set the standard to measure the adequacy of representation in school desegregation cases in *United States v. Board of School Commissioners of the City of Indianapolis*, 466 F.2d 573, 575 (7th Cir. 1972) certiorari denied, 410 U.S. 909, 93 S.Ct. 964, 35 L.Ed.2d 271. There we quoted the Fifth Circuit's opinion in *Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1969), stating that "representation is adequate if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor and if the necessary representative does not fail in the

fulfillment of his duey." See also *Meridian Homes Corporation v. Nicholas W. Prassas & Company*, 683 F.2d 201 at 205 (7th Cir., 1982). The district judge found that the NAACP failed to show inadequacy of representation by the Justice Department and that there was no showing of collusion between the parties. He noted that the NAACP admitted that it and the Government had a similar goal and that the NAACP had not shown that counsel for the Government failed to fulfill his duty. Because the district court held that the NAACP did not carry its burden regarding the inadequacy of representation, its motion to intervene was denied without consideration of timeliness.

As to Clay's motion to intervene, the court remarked that it resermbled "Citizens of Indianapolis for Quality Schools" which was denied intervention in the Indianapolis desegregation case because that would-be intervenor had also not shown that the school board was inadequately representing its interests. *United States v. Board of School Commissioners of the City of Indianapolis, supra*, 466 F.2d at 575-576. In response to Clay's argument that it should be permitted to intervene because defendants too eagerly adopted the desegregation plan, the court pointed out that the Indiana legislature had required the defendant Board of Trustees to adopt a plan of desegregation surpassing minimal constitutional standards by requiring integration to the fullest extent "reasonable, feasible and practical." Ind.Code 20-8.1-2-3. The opinion observed that Clay could seek redress in the state courts if defendants had violated Indiana law. Clay's contention that it wanted to prevent the defendants from "dismantling the neighborhood school system" was rejected because there was no constitutional or statutory right to attend a neighborhood school, as held in *United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978). Therefore Clay's motion to intervene was also denied.[1]

On May 27, 1981, the district court stayed the implementation of the April 17th consent decree pending appeal, and a few days later denied reconsideration of the order refusing intervention. Thereafter the parties moved our Court to vacate the stay and we did so on August 5, 1981, becuase we concluded that appellants had no likelihood of prevailing on the merits of their appeals from the denials of intervention. In doing

1. The National Educational Association-South Bend has filed an *amicus* brief in support of the District Court's order denying the motions to intervene.

so, we noted that (1) a claim resembling Clay's claim of inadequate representation by defendants had been rejected by us in the Indianapolis school desegregation case, *supra*, 466 F.2d 573 at 575-576, (2) Clay had not established the existence of a right to attend a neighborhood school, (3) the district court had not abused its discretion in denying permissive intervention, and (4) Clay had not shown that it would suffer irreparable injury by vacation of the stay. At the same time, we consolidated the NAACP's appeal with Clay's appeal. We now affirm the district court's denial of the motions to intervene.

I *Clay's Motion to Intervene Was Properly Denied*

[1] Clay's motion to intervene as a right under Rule 24(a) of the Federal Rules of Civil Procedure was filed on behalf of all the students in the South Bend school system to challenge the first consent order.[2] The rule provides that such intervention is not warranted if "the applicant's interest is adequately represented by existing parties." As we held with respect to a similar argument in *United States v. Board of School Commissioners of the City of Indianapolis, supra*, the students' interests were already represented by the school board. The school board is a governmental body and its officers are charged by law with representing the interests of the students. Ind. Code 20-5-2-1. Adequate representation of the students is therefore to be presumed where, as here, there had been no showing of gross negligence or bad faith. *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976), certiorari denied, 426 U.S. 921, 96 S.Ct. 2628, 49 L.Ed.2d 375; *Blocker v. Board of Education of Manhasset*, 229 F.Supp. 714, 715 (E.D.N.Y. 1964). As we observed in the Indianapolis school litigation, that a proposed intervenor might be "less prone to agree to the facts and [might take] a different view of the applicable law does not mean that the school board did not adequately represent its interests in the litigation." 466 F.2d at 575. To the same effect, see *United States v. Perry County Board of Education, supra*, 567 F.2d at 280.

Clay (as well as the NAACP) relies on *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc) to support intervention of right. In *Smuck*, three of seven circuit judges found that parents of students could intervene as of right in order to bring

2. Clay has not challenged on appeal the denial of permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure.

an appeal in lieu of the nonappealing school board. 408 F.2d at 178-182. The district court had found that the parents failed to meet the procedural requirements for intervention under Rule 24(c) and moreover failed to allege either "how they or their children are affected" by the district court's decree or "a denial of any rights, constitutional or otherwise." *Hobson v. Hansen*, 44 F.R.D. 18, 25-26 (D.D.C. 1968). The three circuit judges, however, would have allowed the parents' intervention in order to secure appellate jurisdiction. To the extent that the advice of the three judges in *Smuck* may be contrary to *United States v. Board of School Commissioners of the City of Indianapolis, supra*, we will adhere to our opinion in the latter case.[3]

As stated in the first consent decree, the defendants decided it was in the best interests of the students to resolve the segregation controversy without contested litigation, thus avoiding a substantial expenditure of public funds which could be better used to achieve the educational goals of the school system (App. 7). Through that consent order, defendants achieved flexibility in developing their own preferred plan instead of requiring the court to come up with its own desegregation plan. Clay has not shown that defendants did not fairly consider the interests of the students in deciding to agree to the first consent order. Since the district court correctly held that Clay's interests were adequately represented by the defendants, there is no need for us to consider the defendants' alternative ground that Clay's motion to intervene was untimely.

II *The NAACP's Motion to Intervene As of Right Was Properly Denied*

[2] The NAACP first sought to represent as of right all black students in the South Bend school district and their parents even though the interests of that class are represented by the Government under the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974. The NAACP has conceded that it and the Government have a similar objective, namely, "the system-wide desegregation of students and staff as called forin the consent decree" (App. 67). The only disagreement shown was with respect to the "road map" to be used to achieve that goal.

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3. *Smuck* has since been limited by the District of Columbia Circuit in *Moten v. Bricklayers, Masons and Plasterers, etc.*, 543 F.2d 224, 227 (D.C.Cir. 1976), and the Fifth Circuit has expressly declined to follow *Smuck*. *United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978).

Since the NAACP and the Government had the same ultimate objective, we presume that the Government adequately represents the NAACP. *United States Postal Service v. Brennan*, 479 F.2d 188, 191 (2d Cir. 1978). The presumption is especially appropriate because the existing representative, namely, the Government, is charged by law with representing the interests of the absentee. *Commonwealth of Pennsylvania v. Rizzo, supra*, 530 F.2d at 505. There was no showing of gross negligence or bad faith on the part of the Government or collusion between the parties to overcome the presumption of adequate representation. Additionally the NAACP did not demonstrate that the Government was representing any interests adverse to those of the NAACP or that government counsel was ineffective. As already noted, the parties to the suit met with the NAACP and revised the plan incorporated in the second consent decree before its entry on April 17, 1981. In sum, inadequate representation by the Government was not shown.

The NAACP has not attacked the proposed desegregation plan as constitutionally or otherwise inadequate and has merely suggested improvements. A consent decree of this nature need not contain a perfect plan but only one that is "not unconstitutional, unlawful,***contrary to public policy, or unreasonable." *United States v. City of Miami*, 614 F.2d 1322, 1333 (5th Cir. 1980).[4] Therefore the NAACP's supposed improvements for the plan do not require its intervention.[5]

III *The NAACP's Permissive Intervention Motion Was Properly Denied*

[3] In its April 17, 1981, opinion, the district court mentioned that the NAACP alternatively sought permissive intervention under Rule 24(b)(2) of the Federal Rules of Civil Procedure. In footnote 6 to the opinion, the court noted that said Rule required it "in exercising its discretion," to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." This must have been the criterion used by Judge Sharp in *sub silentio*

4. The Fifth Circuit reaffirmed this standard after a rehearing *en banc*. 664 F.2d 435, 441 (1981).

5. The NAACP has stated that it sought intervention partly to challenge the transfer of North Liberty Township to an adjacent school system. However, this transfer was not involved in the lawsuit nor in either consent decree and consequently is impervious to challenge in this lawsuit.

denying permissive intervention to the NAACP because he did not consider the untimeliness of the request. The NAACP's intervention would certainly have delayed the proceedings and prejudiced defendants' ability to open a desegregated school system in the fall of 1981. Therefore the motion for permissive intervention was properly denied on those grounds. *Equal Employment Opportunity Commission v. United Air Lines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975). As this Court correctly predicted in vacating the district court's stay pending appeal, "there is even less likelihood that appellant can prevail on its claim that the district court abused its discretion in denying permissive intervention." April 5, 1981 order p. 4

The order denying the motions to intervene is affirmed.[6]

C. DECISION OF DISTRICT COURT IN S81-313/S80-35 DENYING INTERVENTION TO PETITIONERS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. S 81-313

Mary Laura Brookins,
Mrs. Kathryn J. W. Brookins,
James Reiling,
Mrs. Elizabeth Reiling,
Tricia Riggs,
Mrs. Carol Williams
Mark Gleva, Steven Gleva,
Mrs. Karen Gleva,
Mr. John C Gleva, Sr.,
Romerio Brown,
Mrs. Joyce Lucas,
Bruce Butler, Jr.,
Ms. Tracie Staggers, and all others similarly situated.

Plaintiffs.

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6. Because of our disposition of the motions to intervene, we do not consider the intervenors' opposition to the desegregation plan approved by the district court as well as Clay's argument that the district court was without subject matter jurisdiction.

v.

South Bend Community School Corporation,
James P. Scamman, Superintendent,
The Board of School Trustees of the South Bend
Community School Corporation,
Oscar Brookins,
Donald W. Yates, Loretta Jacobsen,
Eileen Bender, Hollis E. Hughes, Jr.,
Anthony V. Luber, William L. Wilson,
Members of the Board of Trustees,
The United States of America

Defendants

No. S 80-35

United States of America

Plaintiff

v.

South Bend Community School Corporation,
James P. Scamman, Superintendent,
The Board of School Trustees of the
South Bend Community School Corporation,
Robert M. Sweeney, Donald W. Yates,
Marilyn Kalamaros, Eileen Bender,
Hollis E. Hughes, Jr.,
Anthony V. Luber, William L. Wilson,
members of the Board of School Trustees

Defendants

MEMORANDUM AND ORDER

On September 8, 1981, a class action was filed by Mary Laura Brookins and others (Brookins class) against the defendants alleging that the Desegregation Plan approved by this Court on April 17, 1981 in United States of America v. South Bend Community School Corporation et al, Civil No. s 80-35, violates the Constitution of the United States and the laws of the State of Indiana. On October 9, 1981, the defendants filed

a motion requesting that this case be consolidated with United States of America v. South Bend Community School Corporation, supra. By order dated October 13, 1981, the defendants' motion was granted and the amended complaint was thereafter to be treated as a petition to intervene under Rule 24 of the Federal Rules of Civil Procedure.

I.

In February 1980, the United States filed an action under Section 407 of Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, and Section 207 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1706, against the South Bend Community School Corporation, its superintendent, its board of school trustees and the seven members thereof alleging that defendants had engaged in various acts of discrimination with the intent and effect of segregating students and faculty on the basis of race in the South Bend, Indiana public school system. The government sought an injunction prohibiting defendants from discriminating on the basis of race or color in operating the schools within the territory served by the South Bend Community School Corporation and requiring defendants to develop and implement a desegregation plan which would remove all vestiges of prior discrimination.

The district court simultaneously entered a consent order submitted by the parties, requiring defendants to develop and implement a desegregation plan for student assignments by the beginning of 1981-1982 school year. The crux of the plan was to provide that black students in each school would be within 15% of the total percentage of black students in the school system. The plan was also to insure that student transportation or school closings would fall equitably on all racial groups.

The school board enlisted community support for the development of the new student assignment plan. A Citizen's Advisory Committee was formed and over 300 citizens volunteered to serve on subcommittees. Subcommittees met over 150 times between February and December 1980 and nearly 200 people actively participated in the meetings. All meetings were open to the public and were given extensive newspaper publicity. The subcommittees' recommendations were subsequently reported to the school board by the Citizens' Advisory Committee.

During the fall of 1980, the school board's planning team formulated a number of alternative desegregation plans and decided on a recommended plan in late November. On December 17, 1980, the details of the proposed plan were released and the school board held twelve special meetings during the months of December 1980 through February 1981 devoted solely to the plan. All citizens were invited to speak at the meetings and were encouraged to submit written comments.

The Board of School Trustees passed a resolution adopting a school desegregation plan for student assignment during a meeting on February 26-27, 1981. On February 27, 1981, the parties submitted a proposed consent order to this Court incorporating the plan. The plan was subsequently revised and resubmitted to this Court on April 3, 1981. The Court adopted the plan on April 17, 1981, and the plan went into effect at the commencement of the School year in September 1981. On September 6, 1981, applicants for intervention filed this action challenging certain aspects of the desegregation plan approved by this Court and implemented by the South Bend Community School Corporation. Applicants for intervention specifically challenged the choices made by the school board regarding which schools were to be closed and what grade structures and/or programs were offered at schools which remained open on the grounds that the plan was unwise, irrational, unconstitutional and in violation of the laws of the State of Indiana.

II.

The criteria for intervention as a matter of right under Rule 24(a) (2) of the Federal Rules of Civil Procedure and with permission of the Court under Rule 24(b) (2) of the Federal Rules of Civil Procedure are well established. To qualify for intervention as of right under Rule 24 (a) (2), an applicant must meet each of four conditions:

(1) The application must be timely.

(2) The applicant must claim an interest relating to the property or transaction which is the subject of the action.

(3) The applicant must be so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

(4) The applicant's interest is or was not adequately represented by existing parties.

Central States, etc. v. Old Security Life Insurance Company, 600 F. 2d 671 (7th Cir. 1979). See also, NAACPC v. New York, 413 U.S. 345 (1973); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977); United States v. Board of Education of the City of Chicago, 88 F.R.D. 679 (N.D. Ill. 1981). Failure to meet any one of the conditions is sufficient to deny intervention as a matter of right. NAACP v. New York, 413 U.S. at 369; United States v. Board of Education of City of Chicago, 88 F.R.D. at 684. The parties to the original action oppose the application for intervention of the Brookins class on the grounds that (1) the Brookins class is adequately represented by the existing parties, and (2) that the application for intervention is untimely.

This Court is bound by the standard set by the Seventh Circuit Court of Appeals to measure the adequacy of representation in school desegregation cases. United States v. Board of School Commissioners of the City of Indianapolis, 466 F. 2d 573 (7th Cir. 1972), cert. den., 410 U.S. 909 (197); see United States v. South Bend Community School Corporation, 511 F. Supp. 1352, 1357 (N.D. Ind. 1981), aff'd, F. 2d (7th Cir. 1982). See also, United States v. Board of Education of the City of Chicago, supra; United States v. American Institute of Real Estate Appraisers, 442 F. Supp. 1072, 1081 (N.D. Ill. 1977), appeal dismissed, 590 F. 2d 242 (7th Cir. 1978). That standard is as follows:

> [R] epresentation is adequate if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor and if the necessary representative does not fail in the fulfillment of his duty.

466 F. 2d at 575; see, Martin v. Kalvar Corp., 411 F. 2d 552, 553 (5th Cir. 1969). See also, Meridian Homes Corporation v. Nicholas W. Prassas & Company, No. 81-1568, slip op. 7-8 (7th Cir. July 9, 1982). The Brookins class as the applicant for intervention bears the burden of establishing inadequacy of representation. Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n. 10 (1972). In this circuit, the standard set forth in the Indianapolis case "echoes the strict requirement of a 'very compelling showing' that representation of the public interest by the United States is not adequate" in school desegregation cases. United States v. Board of Education of the City of Chicago, supra; United States v. South Bend Community School Corporation, supra.

Under this standard, the Brookins class has failed to make any showing of inadequacy of representation of its interests by the Justice Department. Certainly the Justice Department's conduct in this case has never been collusive, in bad faith or grossly negligent. Furthermore, the interests of the Justice Department are not adverse to the interests of the Brookins class. It is readily apparent from the petition to intervene that the Brookins class, like the Justice Department, desires that the South Bend Community School Corporation be desegregated, the only real point of contention being that the desegregation plan approved by this Court on April 17, 1981 is not the best plan that could have been developed. Although this contention was not an issue in this case at the time the desegregation plan was approved, the question of the adequacy of representation does not depend upon the Court's assessment of the representative's decision, but rather on whether the interest of those represented were fully and fairly considered in arriving at that decision. United States v. American Institute of Real Estate Appraisers, 442 F. Supp. 1072, 1081-1083 (N.D. Ill. 1977), appeal dismissed 590 F. 2d 242 (7th Cir. 1978).

Through the course of this action, the Justice Department has been responsive to the concerns of all of the persons it represents, including the members of the Brookins class. In addition, although the members of the Brookins class believe that their interests are adverse to the defendants, the defendants have also fully and fairly considered their interests at the numerous board meetings which the members of the Brookins class have attended. Consequently, under the standards set forth in United States v. Board of School Commissioners of the City of Indianapolis, supra, the interests of the Brookins class have been adequately represented throughout the course of this litigation.

This Court has already determined that the plan was constitutional based on evidence and information submitted to aid the Court in making that determination.

Second, the Brookins class attack the Plan of Desegregation as unwise and irrational. However, even if the Brookins class may be said to raise issues not heard earlier, allegations attacking the wisdom of this Plan are not enough to support a petition to intervene. United States v. American Institute of Real Estate Appraisers, 442 F. Supp. 1072, 1081-1083 (N.D. Ill. 1977), appeal dismissed, 590 F. 2d 242 (7th Cir. 1978), held that the question of adequacy of representation does not depend on the Court's assessment of the soundness of the

decision of a representative party, but rather on whether the interests of those represented were fully and fairly considered in arriving at that decision. Although challenged on several fronts, the efficiency and effectiveness with which the Justice Department represented those interests has never been successfully challenged. Moreover, although the Brookins class believe their interests are adverse to the defendants, School Board and the administrators of the School Corporation have also fully and fairly considered those interests at the numerous public meetings attended by the plaintiffs and the class.

In light of the foregoing, the Brookins class has failed to carry its burden in regard to inadequacy of representation so this Court need not address the further consideration of timeliness.

III.

The test for permissive intervention under Rule 24(b) (2) of the Federal Rules of Civil Procedure involves an even stricter application of the standards for intervention as of right. EEOC v. United Airlines, 515 F. 2d 946, 949 (7th Cir. 1975); United States v. Board of Education of the City of Chicago, supra, 88 F. R. D. 687; see also, United States v. South Bend Community School Corporation, supra. These standards for intervention have been discussed above and measured against them, the applicants' petition for permissive intervention fails a fortiori.

In addition, Rule 24 (b) (2) requires the Court to exercise its discretion in light of potentional delay and prejudice to the existing parties. Intervention at this late date by the Brookins class would inevitably distract the School Corporation from its present task of orderly and effeciently achieving final and complete implementation of the Desegregation Plan, and cause it to spend substantial time and expense defending the Plan from objections thoroughly considered and resolved by the School Board months ago. The Brookins class has had its day before the Board of School Trustees and intervention now by the Brookins class would prejudice the rights of the original parties.

IV.

In light of the foregoing, petitioners' application for intervention is hereby DENIED and plaintiffs' amended and supplemental complains is DISMISSED. SO ORDERED.

Enter September 22, 1982.

Allen Sharp
Chief Judge
United States District Court

cc: D. Albert
F. Morse
USA
O. Brookins

E. SUPPLEMENTAL ORDER

Filed: Nov. 12, 1982
Richard E. Timmons, CLF
U.S. District Court
Northern District of Indiana

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S81-313

MARY LAURA BROOKINS, et al.,
Plaintiffs,

vs.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Defendants

Cause No. S80-35

UNITED STATES OF AMERICA
Plaintiff,

vs.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Defendants.

ORDER

This case is presently before the court on Plaintiffs' Motion for Relief From Order entered by this court of October 27, 1981. After due consideration, this Court hereby DENIES said motion. SO ORDERED.

Allen Sharp
Chief Judge
United States District Court

Entered this 12 day of November, 1982.

cc: USA
F. Morse
D. Albert
O. Brookins

F. DECISION OF COURT OF APPEALS OCCASIONING THIS PETITION FOR WRIT OF CERTIORARI

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 82-2910

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

MARY LAURA BROOKINS, et al.,
Plaintiffs-Appellants,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
Nos. 81 C 313, 80 C 35 – Allen Sharp, Judge.

ARGUED APRIL 4, 1983 - DECIDED JUNE 23, 1983

Before BAUER and POSNER, *Circuit Judges*, and JAMESON, *Senior District Judge*.*

POSNER, *Circuit Judge*. This is the second time in recent months that we have been asked to reverse an order refusing to allow intervention entered by the district judge who is presiding over the South Bend, Indiana school desegregation case. In the previous case, *United States v. South Bend Community School Corp.*, 692 F.2d 623 (7th Cir. 1982), the National Association for the Advancement of Colored People and a group of South Bend parents called Clay Quality Education II were the would-be intervenors. Although they were not allowed to intervene, their objections to the proposed consent decree led the parties to the suit– the Department of Justice and the South Bend school board–to renegotiate the decree. The renegotiated decree was approved by the district court on April 17, 1981. It was not until September 8, 1981– the day the school year began and the decree went into effect (this court having on August 5 vacated its stay of the decree pending appeal, see 692 F.2d at 627)–that the would-be intervenors in the present case, a group of mostly black parents known as the "Brookins class," filed their motion to intervene. (Actually, they filed an independent lawsuit against the school board, but consented to have their complaint treated as a motion to intervene in the Justice Department's suit.) The district court denied their motion, and they appeal.

Our previous decision, along with many similar decisions in this and other circuits, see, e.g., *United States v. Board of School Comm'rs of Indianapolis*, 466 F.2d 573 (7th Cir. 1972); *Penick v. Columbus Education Ass'n*, 574 F.2d 889 (6th Cir. 1978) (per curiam); *Hoots v. Commonwealth of Pennsylvania*, 672 F.2d 1133 (3d Cir. 1982), largely disposes of this appeal. In dealing in our previous decision with the NAACP's motion to intervene, we pointed out that Rule 24(a)(2) of the Federal Rules of Civil Procedure creates a right to intervene only if the interest of the would-be intervenor is not adequately represented by an existing party, and that since both the NAACP and the Department of Justice wanted the same thing–desegregation of the South Bend public schools–the Department of Justice was presumed to be an adequate representative of the NAACP's interest. 692 F.2d at 628. The Brookins class has the same interest as the NAACP and so of the Department–

* Hon. William J. Jameson of the District of Montana, sitting by designation.

desegregating the South Bend public schools. No more than in the previous round is there any allegation that the Department of Justice is incompetent, or acting in bad faith, or colluding with the school board.

The appellants note the statement in our previous opinion that "the NAACP has not attacked the proposed plan as constitutionally or otherwise inadequate and has merely suggested improvements," *id.*, and point out that they do contend the plan is inadequate and unconstitutional. But the quoted statement was an observation, not a holding. Adequacy of respresentation and the substantive nature of the would-be intervenor's challenge are analytically distinct. If a parent could intervene in a school desegregation suit as of right merely by stating his concern in constitutional terms, or by denouncing the decree rather than seeking to modify it incrementally, the requirement of adequacy of representation would be a dead letter, and school desegregation suits would become unmanageable.

Nor was the Brookins class entitled to a hearing to explore its substantive allegations. That would have amounted to granting the motion to intervene. We acknowledge some superficial appeal to the appellants' contention that if the decree is as bad as they say it is, their interests are not being adequately represented by the Department, and that the district court could not determine whether it was as bad as they say it is without granting them a hearing. But the appellants could if they had wanted prosecute their own suit against the school board. They started down that road but then decided to piggyback on the Department. This they could do only within the limits of Rule 24(a)(2), which makes inadequacy of representation an absolute requirement in order to prevent litigation from becoming hopelessly complex.

There is an alternative basis for the district court's denial of the motion to intervene. Rule 24(a)(2) requires that the motion to intervene be "timely," although it does not attempt to define the term or specify rigid time limits. The purpose of the requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal. As soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene. The revised consent decree was entered on April 17 and long before then its outlines were perceptible. Nevertheless, the Brookins class waited four

and a half months after the decree was entered to file its motion. It should have filed within days of the April 17 order, if not sooner; there was no excuse for waiting till the school year began, so that if the motion had been granted the implementation of the decree would have been delayed. "[A] motion to intervene after entry of a decree should be denied except in extraordinary circumstances." *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 674 F.2d 970, 974 (3d Cir. 1982). There were none here.

Insofar as the appeal challenges the district court's refusal to allow permissive intervention (Rule 24(b)(2)), it is frivolous in light of our previous decision. See 692 F.2d at 629. And since the appellants were properly excluded from the lawsuit they do not have the rights of parties and therefore cannot as they wish to do appeal from, and hence get us to determine the validity or adequacy of, the consent decree.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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G. DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 7, 1983

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. WILLIAM J. JAMESON, Senior District Judge*

* Hon. William J. Jameson of the District of Montana, sitting by designation.

No. 82-2910

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

MARY LAURA BROOKINS et al.,
Plaintiffs-Appellants

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division.

Nos. 81 C 313, 81 C 35
Allen Sharp, Judge

ORDER

On July 6, 1983, plaintiffs-appellants Mary Laura Brookins, et al., filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

H. DENIAL OF MOTION FOR CORRECTION OF CAPTION

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinos 60604

September 7, 1983

Before

Hon. RICHARD A. POSNER, Circuit Judge

No. 82-2910

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

MARY LAURA BROOKINS,
MRS. KATHRYN J. W. BROOKINS, et al.,
Plaintiffs-Appellants,

vs.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division

Nos. 81 C 313 and 80 C 35
Judge Allen Sharp

The "MOTION FOR CORRECTION OF CAPTION BY PLAINTIFF-APPELLANTS MARY LAURA BROOKINS, ET AL." is DENIED.

I. DOCKET IN S81-313,
PETITIONERS' CASE IN DISTRICT COURT

Dist: 0755
Off: 3
Docket Yr.: 81
Docket No.: 0313
Filing Date: 09-08-81
J: 3
N/S: 440

O: 1
R 23: 1
$ Demand: inj. & decl. relief
Judge: 5507
Mag. No.: 55AC
County: 18141

PLAINTIFFS:

(1) Mary Laura Brookins
(2) Mrs. Kathryn J. W. Brookins
(3) Mrs. Elizabeth Reiling
(4) James Reiling
(5) Tricia Riggs
(6) Mrs. Carol Williams and all others similarly situated

Add:

Mark Gleva
Steven Gleva
Mr. S. Karen Gleva
Mr. John C. Gleva, Sr.
Romerio Brown
Mrs. Joyce Lucas
Bruce Butler
Mrs. Tracie Marie Staggers

DEFENDANTS (consol w/S80-35)

(1) South Bend Community School Corporation
(2) James P. Scamman, Superintendent
(3) The Board of School Trustees of the South Bend Community School Corporation
(4) Oscar Brookins
(5) Donald W. Yates
(6) Loretta Jacobsen
(7) Eileen Bender
(8) Hollis E. Hughes, Jr.,
(9) Anthony V. Luber
(10) William L. Wilson,
Members of the Board of School Trustees
(11) United States of America 10/19/81

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28 USC 1343, (42 USC 1983); 42 USC 2000c-6 (a) and (b); 20 USC 1701 et seq. Article III of the U.S. Constitution. Defts. have deprived Pltfs. of federal constitutionally guaranteed rights by closures & changes in use, resulting in segregated education & have been wasteful of their trust & constructively fraudulant toward their beneficiaries.

ATTORNEYS

David W. Albert
19271 Darden Road
South Bend, Indiana 46637
(219) 272-1892

1, 2, 3, 5, 6, 7, 8, 9, 10:
Franklin A. Morse II
6th Floor First Bank Bld
South Bend, IN 46601
(219) 233-1171

(11)AUSA/J. Leonardo
Fed. Bldg., S.B.

Oscar Brookins
South Bend Community
School Corp.
Administrative Office
635 S. Main Street
South Bend, IN 46601

Filing Fees Paid: 9-8-81
Receipt No: 1236
C. D. No: 158452
Statistical Cards: Date Mailed: JS-5: 10-1-81

PROCEEDINGS

9/8/81	Complaint for injunctive relief & appl. for TRO without notice or for a TRO with notice filed w/ abbreviated statement of authority & cert. of applicant's atty. regarding attempts to give notice. Filing fee paid. Bond requested. Summons issued & delivered to USM. CLASS ACTION ALLEGATION.	kb
9/8/81	Pltf. tenders bond	kb
9/9/81	ORDER: Pltf ordered to give notice to defts; defts shall have 30 days to respond to the complaint. (SE) SHARP, TH(CC's Albert, USM (for serv w/compl)	th
9/14/81	Pltf. fls. mot for release of bond.	ee
9/22/81	Summons returned executed as to Oscar Brookins on 9/14/81; Eileen Bender on 9/11/81; William W. Wilson on 9/11/81; Hollis E. Hughes, Jr. by serving W. Wilson on 9/11/81; Donald Yates, James Scamman & Loretta Jacobsen, all on 9/11/81 by serving Valerie Wrun, secretary; Anthony Luber by serving Jean Gonter, secretary on 9/11/81; and S. Bend Comm. School Corp. & Bd. of School Trustees by serving F. Morse, atty. on 9/10/81.	kb
9/24/81	ORDER: Bond of Pltfs in amt. of $10,000.00 is ordered released to Pltfs. (SE)SHARP, TH(CC's Albert & US Fidelity & Guaranty Co.)	tb

9/25/81	Appear. of Franklin A. Morse II and Bruce R. Bancroft fls. obo SB Comm. School, J. Scaman, Bd. of School Trustees, D. Yates, L. Jacobsen, E. Bender, H. Hughes, A. Luber, W. Wilson, membrs.	ee
9/28/81	Amended compl. fld. for inj. and TRO. w/class act. alleg.	ee
10/2/81	Pltfs' confirmation of the array of defts.	kb
10/7/81	Mot for ext of time by defts.	th
10/8/81	Mot. of defts. to dismiss certain defts.	kb
10/8/81	ORDER: mot for ext of time granted to & incl 10/16/81. (SE)SHARP, TH(Ccc's Albert, Morse.	th
10/9/81	Defts' answer, motion to strike w/memo & motion to consolidate.	kb
10/13/81	ORDER: Mot to consolidate w/S80-35 is granted & is considered pet to intervene pursuant to FRCP 24. (SE)SHARP,TH(cc's USA, Bancroft, Schabel, Fedder, Atkins, Reed, Albert, Morse)	th
10/13/81	ORDER: O/A & hrng on all pending mots set for OCTOBER 28, 1981 at 2:00 PM. (SE) SHARP, TH(cc's USA, Morse, Schabel, Fedder, Atkins, Reed, Albert, cals)	th
10/16/81	Mot. for Leave to Amend compl. to add USA. fld by pltf. w/compl. att.	ee
10/19/81	ORDER: Mot to amend compl is granted; & USA is names as a deft & given 30 days in which to respond (SE)SHARP,TH(cc's USA, Bancroft, Schabel, Fedder, Atkins, Reed, Albert, Morse, USM) Sums issued (3)	th
10/22/81	Pltfs fl. Mot to Reconsider 10/13/81 order and Memo Memo in Opposition to Def. Mot to Strike fld.	ee
10/27/81	Defts.' mot to deny petitioners' application to ntervene and to dismiss complaint.	21
10/27/81	Defts.' memo in opposition to peition to intervene	sl
10/27/81	Pltf. mot. for relief from order w/memo in support	sl
10/28/81	USA memo in opp. to mot. to intervene.	sl
10/28/81	Hrg. on mots. Ptys. to file simult. briefs by 11/16/81. Pltf. files aff. of C. Williams. SHARP, J.	sl

11/3/81	Summons returned served on USA-S. Bend by serving V. Vollmer on 10/27/81.	kb
11/5/81	Report of So. Bend Comm. Sch. Corp purs. to 2/8/80 order fld. in 80-35	ee
11/9/81	Summ. rtd. served on Atty. Gen USA by cert mail on 11/2/81 and on Civil Rights Div on 11/2/81	ee
11/16/81	Pltf. trial brief fld.	ee
11/16/81	Def. fls. Supplmt. Memorandum in Oppos. to Pet. to Intervene.	ee
11/19/81	US Files Response to Issues as Framed by Ct.	ee
11/23/81	USA FLS. Mot ext time.	ee
11/25/81	Pltfs.' response to the mot. of USA for ext. of time.	sl
7/23/82	Minute; Affidavit "A" in support of pltfs' suppl. exhibit; Affidavit "B" in support of pltfs' suppl exhibit; Pltfs' suppl exhibit No. 21; Cert of serv; Pltfs' suppl exhibit No. 20 (in manila envelope)	th
8/6/82	AFFID. in Supp Pltf. supp. exh No. 25 Sec. Amd. Compl. fld. w/att.	ee
8/9/82	ORDER: Parties to brief & exchanged by 9/7/82. (SE)SHARP,TH(cc's Albert, Morse, USA, Brookins, Schabel, Fedder, Atkins,Reed)	th
8/12/82	AFFID. IN SUPP. Pltf Suppl Exh No. 22 "City Boundaries incl. Census Tracts & Exh No. 22; AFFIDS. "A", "B", "C" Supp. Exh. No. 23 Locat. K - 6 students & exh. 23; (Bulky exh 23 in back-room) SECOND AFFID. Richard Lamanna fld. being exh 26; AFFID. Supp. supp. exh No. 27 ent. Educ. Reog. Prog.	ee
FILE 3:		
8/20/82	THIRD. AFFID. Richard Lamanna exh 28 Sec. Amend. Comp; Affid. Supp. of Pltf. Suppl. Exh 29; Affid. Supp. of pltf. Supp. Exh 30 fld.	ee
9/2/82	RESPONSE of US fld. w/memo.	ee
9/3/82	Brief of pltfs. in S81-313; aff. in support of Ex. 8 & aff. in support of Ex. 31	kb
9/7/82	Defs Sec. Supplmtl Memo in Opposit to Petit to Intervene fld.	ee

9/17/82	Identification of further named pltf & motion; LaMont & Raymond Chatman; Identification of further named pltf & motion; Tyrone Bradshaw; Verified application for preliminary relief; Affidavit in support of verified appl. for prelim relief; Memo accompanying same by Pltfs.	th
9/23/82	MEMO & ORDER: Application for intervention is DENIED & Pltfs' amended and supplemental complaint is DISMISSED. (SE)SHARP,TH(cc's Albert, Morse, USA, Brookins)	th
9/28/82	PLTF Petit. for Interv. fls Mot for Supplemt ord w/memo.	ee
10/5/82	PLTF MOT to Reconsider and Memorandum fld.	ee
10/8/82	CORRECTION of phrase by pltfs fld.	ee
10/14/82	ORD. ent. C/A on 10/8/82 by W. Cummings that unpubl. ord. 7/28/82 be published (in S80-35)	ee
10/15/82	PLTF fls. Corrected Exh No. 14.	ee

J. DOCKET IN S80-35

Dist: 0755
Off: 3
Docket Yr: 80
Docket No: 0035
Filing Date: 02-08-80
J: 1
N/S: 440

O: 1
Judge/Mag No: 5507
Docket Yr: S80
Docket No: 0035

PLAINTIFFS:

United States of America

DEFENDANTS (consol w/S81-31)

1 **South Bend Community School Corporation**
2 **James P. Scamman, Supt.**
3 **The Board of School Trustees of the South Bend Community School Corporation**
4 **Robert M. Sweeney**
5 **Donald W. Yates**
6 **Marilyn Kalamaros**

7 Eileen Bender
8 Hollis E. Hughes, Jr.
9 Anthony V. Luber
10 William L. Wilson, members of the Board of School Trustees
11 United States of America 10/19/81

CAUSE

42 U.S.C. 2000c-6(a) & (b); 20 U.S.C. 1701

ATTORNEYS:

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South Bend, IN

1 - 10 Bruce R. Bancroft
Franklin A. Morse, II
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(219) 233-1171

PROPOSED INTERVENORS – PLTF
CLAY QUALITY EDUCATION II INC.

Donald A. Schabel
One Indiana Square
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Indpls, IN 46204
(317) 632-2670
&
Kenneth P. Fedder
300 First Bank Bldg.
South Bend, IN 46601
(219) 234-6061

NO. 11
AUSA/J. Leonardo
Fed Bldg. SB

PRO HAC VICE

NAACP
Thomas I. Atkins/Teresa Demchak
NAACP-1709 Broadway
New York, N.Y. 10019
(212) 245-2100

Melvin Reed
617 West LaSalle Ave.
South Bend, Indiana
(219) 234-5050

Statistical Cards: Date Mailed: JS-5: 3/3/80

PROCEEDINGS

2/8/80	Complaint filed.	
2/8/80	Appearance of Bruce R. Bancroft & Franklin A. Morse, II filed on behalf of all Defts.	sl
2/8/80	Consent Order entered (SE)SHARP, J. Copies: USA, Morse.	sl
2/8/80	Judgment entered by Clerk pursuant to Consent Decree with each party to bear its own costs.	sl
11/25/80	Def. SB Comm. School files documents purs. to Consent order of 2/8/80. with attachments (large IBM runs)	ee
2/26/81	Appearance of Donald A. Schabel and Kenneth P. Fedder for Clay Quality Education II.	
2/26/81	Mot to intervene as deft filed by Clay Quality Education II Inc.	
2/26/81	Request for O/A & c/s filed by above.	th
2/26/81	Ord. entrd. hrg. set for Thurs. 3/5/81 at 3:00 PM EST. (SE)SHARP,J. cc: All cps to K. Fedder for distrib. to all cnsl. Calendars.	ee
2/27/81	Jt. Motion for hearing on entry of Consent Decree fld.	ee
3/3/81	S. Bend Branch of NAACP files motion to intervene, brief in support, motion to file intervention complaint out of time & motion to defer hearing.	kb
3/5/81	USA fls. Response to Def. Applica. Mot. to Intervene and also their Memorandum in oppos. to Prop. Mot. of Interv. Def. to Vacate Consent Order.	ee
3/5/81	Hrg. on Mots. to intervene & vacate consent order. All ptys. to file suppl. briefs & exchange b6 3/27/81 SHARP, J.	sl
3/9/81	Ordered that all parties who are attempting to intervene are requested to include subject matter jurisdiction in all briefs on or before 3/27/81. (SE) SHARP,TH(cc's USA, Bancroft) (Reed, Fedder)	th
3/19/81	Pltf-intervenor files motion for leave to appear pro hac vice.	kb
3/19/81	Ct. Rptr. files transcript of proceedings had 3/5/81	kb

3/20/81	Ordered that mot of NAACP's counsel to appear Pro Hac Vice is GRANTED. (SE)SHARP,TH (cc's USA, Morse, Schabel, Fedder, Atkins, Reed)	th
3/27/81	USA files response in opposition to motion to intervene & files supplemental response re subject matter jurisdiction.	kb
3/27/81	Application for intervention Clay Quality Education files brief & tenders proposed answer & cross-claim. (all copies of answer & cross-claim to J. Sharp)	kb
3/27/81	Defts. file supplemental memo in opposition to motions to intervene & in support of motion to approve amended consent decree	kb
4/3/81	Pltf. Applic. for interv. NAACP files Suppl. Brief and Compl. for Intervention.	ee
4/3/81	Req. for Hearing on Desegregation Plan fld. by def.	ee
	Consent order submitted.	ee
4/3/81	Misc. ltr. from M. Grontkowski rcvs.	ee
4/17/81	Memo & Order entered that Ct approves the Consent Order submitted on 4/3/81 and amends it hereto. (SE)SHARP,TH; Consent order approved & entered (SE)SHARP,TH(cc's USA, Bancroft, Schabel, Fedder, Atkins,.	
4/20/81	Response to requires for hrng of SB Schl Corp's on desegregation plan filed by NAACP	th
5/4/81	Mot. of Pltf.-appl. for intervention NAACP for reconsideration of this Court's order denying our mot. to intervene and approving, w/out hrg., the Defts' proposed desegregation plan	sl
5/13/81	Notice of Appeal filed by Clay Quality Ed. and Fees paid. Mot. for Stay pend. appeal filed (will need supsedeas bond)	ee
	Clerk's certif. of fil. Not. app. to Ready, Bancroft, Morse, Schabel, Fedder, Atkins, Reed and to C/A w/info sheet and cpy dock.	ee
5/18/81	Mot. of Def. SB Comm. Sch. for Modif. of Order of 4/17/81 fld.	ee

5/21/81	Response of the United States to Motion of Deft. for Modification of order of April 1, 1981.	al
5/21/81	Ordered that request for modification of order of April 17, 1981 is modified by provision in paragraph 5. (SE)SHARP,TH(cc's USA, Morse, Schabel, Fedder, Atkins, Reed	
5/22/81	Num. assign. In C/A = 81-1792.	ee
5/22/81	Mot for O/A; Brief in opposition to mot for stay by Deft.	th
5/26/81	File sent to C/A with index copy of docket sheet, and copies of transmittal letter sent to Attys and C/A file sent by Registered Mail No. 0756	al
5/27/81	STAY of injunction pending appeal entered. SHARP, J. (Copies Fedder, Schabel, Morse, Ready, Turner, Atkins, Reed, Breckenridge-ejs w/copy to C/A)	
5/28/81	Defts' Mot for reconsideration and vacation of stay order w/Memo in Support.	ejs
5/29/81	Mot. of Pltf. to vacate stay.	al
6/1/81	Ordered that mot for reconsideration is DENIED; ordered that defts' mot for reconsideration & vacation of the stay offer is DENIED; ordered that pltf's mot to vacate stay is DENIED; principal purpose of within rules is to clear and clean the record so that the issues can be submitted to Ct. of Appeals (SE)SHARP,TH(cc's USA, Bancroft, Schabel, Fedder, Atkins, Reed) (cc CA)	th
5/4/81	Substitute page 9 to the above pleading filed by defts. on 5/28/81.	th
6/30/81	Notice of appeal from order of 6/1/81 denying pltf-applicant for intervention reconsideration of its previous order entered on 4/17/81 by NAACP. NO DOCKETING FEE OR FILING FEE PAID.	th
6/30/81	Clerk's Certificate; (cc's USA, Morse, Schabel, Fedder, Demchak, Reed, 7th Cir) Information sheet; Cert cc docket entries; sent to Clerk, 7th Cir.	th
7/8/81	Filing fee & docketing fee paid; receipt no. 999. (informed CA) (CA No. 81-2062)	th

7/8/81	Order of 6/1/81; Notice of appeal; Clerk's Certificate; cert cc's docket entries; Sent 7th Cir. One fol. Registry No. 70846 Attys notified.	th
8/7/81	Order rec'd. from CA VACATING Dist. Ct.'s order of 5/27/81.	kb
10/13/81	ORDER: O/A & hrng on all pending mots set for OCTOBER 28, 1981 at 2:00 PM. (SE) USA, Morse, Schabel, Fedder, Atkins, Reed, Albert, Bancroft, CALS)	th
10/16/81	Pltfs. fl. Mot. for leave to Amend comp. w/attach compl.	ee
10/19/81	ORDER: Mot to amend compl is granted; & USA is names as a deft & given 30 days in which to respond (SE)SHARP,TH(cc's USA, USM, Bancroft, Schabel, Fedder, Atkins, Reed, Albert, Morse) (Sums issued (3))	th
10/22/81	Pltfs. fl. Mot to Reconsider 10/13/81 order and Memo. Memo. in Opposit to Def. Mot to Strike fld.	ee
10/27/81	Defts.' memo in opposition to petition to intervene and to dismiss complaint.	sl
10/27/81	Defts' memo in opposition to petition to intervene	sl
10/27/81	Pltf. mot for relief from order w/memo in support	sl
10/28/81	USA memo in opp. to mot. to intervene	sl
10/28/81	Hrg. on mots. Ptys. to file simult. briefs by 11/16/81. Pltf. files aff. of C. Williams. SHARP, J.	sl
11/3/81	Summons returned served on USA by serving V. Vollmer on 10/27/81.	kb
11/5/81	Report of So. Bend Comm. Sch. purs. to 2/8/80 fld.	ee
11/9/81	Summ. rtd. served on aatty. Gen. USA and on Civil Rights Div. both by cert. mail and on 11/2/81 (see 81-313)	ee
11/16/81	Pltf. trial brief fld.	ee
11/16/81	Def. fls. Supp.mt Memo. in Oppos. to Petit to Intervene	ee
11/19/81	US FLS. Response to Issues as framed by Ct.	ee
11/23/81	USA fls. Mot for Ext time.	ee

11/25/81	Pltf. response to the mot. of the USA for ext. of time.	sl
7/23/82	Minute; Affidavit "A" in support of Pltfs' suppl exhibit; Affidavit "B" in support of pltfs' suppl exhibit; Pltfs' suppl exhibit No. 21; cert of serv; Pltfs' suppl exhibit No. 20 (in manila envelope)	th
8/6/82	AFFID in Supp Pltf. Supp. exh No. 25 Sec. Amd. Comp fld in 81-313	ee
8/9/82	ORDER: Parties to brief & exchanged by 9/7/82. (SE)SHARP,TH(cc's Albert, Morse, USA, Brookins, Schabel, Fedder, Atkins, Reed)	th
8/12/82	AFFID. supp. pltf. Exh 22; Affids. A,B,C Supp Exh 23; AFFID. Supp Exh. No. 24; Second Affid. Richard Lamana exh 26, Affid Supp Exh No. 27 ea. fld. in 81-313	ee
8/18/82	Copy of mot. to publish from C/A filed by Defts.	sl
8/20/82	THIRD AFFID. Richard Lamanna exh 28 Sec. Amend. Comp; Affid. Supp of Pltf. Suppl. Exh 29; Affid. Supp. of Pltf. Supp. Exh 30 ea. fld. in S81-313.	ee
8/25/82	Cert cc mandate received from 7th cir; "judgment of Dist. Ct AFFIRMED, w/costs) Judges Cummings, Bauer, Doyle, 7/28/82; File; 5 vols (incl. supplements) 1 env IBM runs; received from 7th cir.	th
9/3/82	Brief of pltfs. in S81-313; aff. in support of Exhibit 8 & aff. in support of Exhibit 31.	kb
9/15/82	Bill of Costs fr. C/A for $352.50 fld. (cpy to Vi)	ee
9/17/82	Identification of further names pltf & motion; LaMont & Raymond Chatman; Identification of further mnames pltf & motion; Tyrone Bradshaw; Verified application for preliminary relief; Affidavit in support of verified appl. for prelim. relief; Memo accompanying same by Pltfs.	th
9/23/82	MEMO & ORDER: Application for intervention is DENIED & Pltfs' amended and supplemental complaint is DISMISSED. (SE)SHARP,TH(cc's Albert, Morse, USA, Brookins)	th
9/28/82	PLTF. Petit for Interv. fls Mot for Supplmt. Order with Memo	ee

10/5/82	PLTF Mot to Reconsider and Memo fld.	ee
10/8/82	CORRECTION by pltfs of phrase fld.	ee
10/14/82	ORD. ent. C/A on 10/8/82 by W. Cummings that unpublished order of 7/28/82 be issued as fully citable opinion. (cpy judge)	ee
10/15/82	Pltfs fl. Corrected Pltf Exh. No. 14.	

K. DECISION OF FIFTH CIRCUIT IN ADAMS V. BALDWIN

Thomas L. ADAMS et al.,
Movants-Appellants,

United States of America, Plaintiff,

v.

BALDWIN COUNTY BOARD OF EDUCATION OF BALDWIN COUNTY, GEORGIA, et al.,
Defendants-Appllees.

No. 79-3370
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Oct. 23, 1980.

The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, denied an application to intervene in a school desegregation case, and appeal was taken. The Court of Appeals held that when parents move to intervene in school desegregation cases, court must conduct an evidentiary hearing and enter findings based upon an adequate record.

Reversed and remanded.

Federal Civil Procedure 321

When parents move to intervene in school desegregation cases, court must conduct an evidentiary hearing and enter findings based upon an adequate record. Fed. Rules Civ. Proc. Rule 24, 28 U.S.C.A.

Charles A. Mathis, Jr., Thomas M. Jackson, Macon, Ga., for movants-appellants.

George M. Stembridge, Jr., Milledgeville, Ga., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before CHARLES CLARK, VANCE and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

This is a school desegregation case asserting a cause of action under 42 U.S.C. 2000c-6. The original oomplaint was filed on February 14, 1968. After remand by this Court in *United States v. Board of Education of Baldwin County, Georgia*, 423 F.2d 1013 (5th Cir. 1970), the district court entered a *Singleton*[1] decree against the defendants on March 26, 1970. No appeal was taken from that order.

On May 22, 1979, a number of individuals filed a motion to intervene, which alleged (1) discrimination in hiring and dismissal practices as well as in discipline practices, (2) discrimination in the nonrenewal of the contract of an assistant principal named Olen Reaves, (3) discrimination in the transportation system, and (4) discrimination assigning students to certain advanced studies programs. Movants also sought to convert the suit into a class action composed of two subclasses: (1) all black elementary and high school students, and (2) all black teachers, counselors, administrators, and principals whose employment had been terminated after October 15, 1968. With the exception of Olen Reaves, all of the Original movants were representatives of the student subclass. On July 16, 1979, the district court denied the application of Reaves to intervene.[2] The court then invited the remaining applicants, including the names party, Thomas L. Adams, to submit affidavits in support of their motion. The court also allowed the school board to submit counter-affidavits. On the basis of these, the court determined that the only nonconclusional facts averred in support of the motion to intervene were those concerning discrimination in the transportation system, and that

[t]he remainder of their claims have not been supported by

1. *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1970), modified *sub nom. Carter v. West Feliciana Parish School Board*, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970), on *remand Singleton v. Jackson Municipal Separate School District*, 425 F.2d 1211 (5th Cir. 1970).

2. Because Reaves failed to appeal this order, the issue of the nonrenewal of his contract has been removed from this suit.

affidavits of fact demonstrating any possible substantial claim of discrimination other than as to a limited number of individual students whose alleged problems are not shown to be part of a possible pattern of discrimination.

The court permitted intervention on the transportation issue only.

Movants argue that they are entitled to intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Alternatively, movants urge that the district court abused its discretion in denying permissive intervention under Rule 24(b).[3]

Hines v. Rapides Parish School Board, 479 F.2d 762 (5th Cir. 1973), established guidelines for the application of Rule 24 to school desegregation cases. In *Hines*, this Court held that a petition for intervention should bring to the district court's attention the precise issues that the movants seek to represent and the ways in which the goal of a unitary system allegedly has been frustrated. Based upon the petition and accompanying complaint, the district court should then determine whether the matters raised in the plea previously have been raised and resolved and whether the issues sought to be presented by the new group currently are known to the court and parties in the initial suit. Under this analysis, if the court determines that the issues raised by movants have been determined or if it finds that the parties in the original action are aware of those issues and completely competent to represent the interests of the new group, it could deny intervention. Conversely, if the court feels that the movants have a significant claim that they best could represent, intervention would be allowed. *Id.* at 765[4]

Movants argue that, in ruling on the motion to intervene the district court ignored the guidelines established in *Hines v.*

3. Rule 24(a)(2) creates a three part test for intervention as of right. A party must be allowed to intervene if (1) he claims an interest in the subject of the action, (2) he is so situated that the disposition of the action may as a practical matter impair his ability to protect that interest, and (3) his interest is not adequately represented by existing parties. Under Rule 24(b), a district court may permit intervention if to do so will not unduly delay or prejudice adjudication of the rights of the original parties. Unlike Rule 24(a), however, a district court's refusal to grant permissive intervention is reviewable only for abuse of discretion.

4. Movants argue that under this Court's decision in *Hines v. Rapides Parish School Board* parent groups with complaints growing out of desegregation litigation are entitled to intervention as a matter of right. In *Pate v. Dade County School Board*, 588 F.2d 501, 503 (5th Cir. 1979), *cert. denied*, 444 U.S. 835, 100 S. Ct. 67, 62 L.Ed.2d 44 (1979), however, this Court specifically rejected any such interpretation of *Hines*.

Rapides Parish School Board, and failed to enter findings of fact and conclusions of law in conformity therewith. In desegregation cases, a district court's ruling on a plea in intervention must be supported by findings based upon an adequate record. *Calhoun v. Cook*, 487 F .2d 680 (5th Cir. 1973); *Lee v. Macon County Board of Education*, 482 F.2d 1253 (5th Cir. 1973). In the present case, the district court's order addressed neither the requirement of Rule 24 nor the standards established in *Hines*. Moreover, the court failed to articulate findings in support of its conclusion that movants' claims failed to demonstrate any possible substantial claim of discrimination.

When parents move to intervene in school desegregation cases, the important constitutional rights at stake demand a scrupulous regard for due process considerations. *Jones v. Caddo Parish School Board*, 499 F.2d 914 (5th Cir. 1974). This Court has determined that intervention, rather than a separate action, is the proper vehicle for parents claiming inadequate representation to assert their rights. Denial of a plea in intervention, therefore, often will deprive those parties of their only opportunity to be heard. Consequently, we adhere to our earlier decisions requiring the district court to conduct an evidentiary hearing, and to enter findings based upon an adequate record. *Jones v. Caddo Parish School Board*, 499 F.2d 914 (5th Cir. 1974); *Calhoun v. Cook*, 487 F.2d 680 (5th Cir. 1973). *See also United States v. Perry County Board of Education*, 567 F.2d 277 (5th Cir. 1978).

For the aforementioned reasons, we reverse the district court's order to the extent that it denies movants' plea in intervention and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Office - Supreme Court, U.S
FILED
MAR 8 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-915

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARY LAURA BROOKINS, ET AL., PETITIONERS

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying petitioners' intervention in this school desegregation suit, which was sought on the day that the plan embodied in a consent decree was to be implemented, more than four months after the district court approved the decree.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-915

MARY LAURA BROOKINS, ET AL., PETITIONERS

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 52-55) is reported at 710 F.2d 394. An earlier related opinion of the court of appeals not involving petitioners (Pet. App. 35-44) is reported at 692 F.2d 623. The opinion of the district court (Pet. App. 44-51) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1983. A petition for rehearing was denied on September 7, 1983 (Pet. App. 55-56). The petition for a writ of certiorari was filed on December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 8, 1980, the United States filed suit pursuant to 42 U.S.C. 2000c-6 and 20 U.S.C. 1706 against the South Bend Community School Corporation, its Superintendent, and its Board of School Trustees, alleging that they

had unconstitutionally segregated students and faculty on the basis of race. On the same day, the parties submitted and the district court entered a consent order, which obligated the defendants to develop a desegregation plan, in consultation with the United States, and to implement the plan by the start of the 1981-1982 school year. Over the following year, the school board elicited widespread community participation in developing a plan. In December 1980, details of the plan were made available to the public through extensive media coverage. From December 1980 through February 1981, the school board held a dozen open meetings at which citizens were invited to air their views. Throughout that process, the school board made it known to the public that it was operating on a timetable that required implementation of a desegregation plan by the beginning of the 1981-1982 school year. Pet. App. 37-38.

On February 27, 1981, the parties submitted the plan as a proposed consent order to the district court (*ibid.*). Two groups sought intervention in the proceeding at that time. On the previous day, February 26, 1981, a group of parents (Clay) sought to intervene as defendants on the ground that the 1980 consent order was improperly entered because there was no finding or admission of a constitutional violation. Five days later, the South Bend Branch of the National Association for the Advancement of Colored People (NAACP) sought to intervene on behalf of a class of black students to raise questions about several particulars of the 1981 desegregation plan, including the impact of various school closings. Pet. App. 38-39. The district court held a hearing on both motions on March 5, 1981. On April 3, 1981, the parties submitted a revised proposed consent order to answer some of the concerns of the NAACP. Pet. App. 39.

On April 17, 1981, the district court denied both motions to intervene, finding that the NAACP and Clay were adequately represented by the United States and the school board, respectively. 511 F. Supp. 1352 (1981). The district court further concluded that the proposed consent order was lawful and constitutional and ordered its implementation. The court of appeals affirmed (Pet. App. 35-44; 692 F.2d 623 (1982)).

2. On September 8, 1981, the first day of the 1981-1982 school year, more than four months after the district court had approved the consent decree, petitioners filed a class action on behalf of students who had previously attended schools that petitioners alleged were "naturally integrated" and were either closed or converted to middle schools or alternative schools pursuant to the desegregation plan. The amended complaint alleged that the consent order violated both the Constitution and Indiana law. On October 13, 1981, the district court granted the school board's motion to consolidate this action with that of the United States and styled the complaint as a motion for intervention. Pet. App. 45-46. The motion, along with a subsequently filed motion for relief from the April 17, 1981, consent order, was considered at a hearing held on October 28, 1981. The district court then stayed consideration of petitioners' action pending a decision by the Seventh Circuit on the Clay and NAACP appeals.

On September 22, 1982, the district court issued an order denying the motion to intervene and dismissing the complaint (Pet. App. 44-51). The court held that the United States had adequately represented petitioners' interests and stated that the defendants also had "fully and fairly considered those interests" in developing the desegregation plan and therefore petitioners were not entitled to intervention as of right (*id.* at 49). The court also denied permissive intervention because of the prejudice that would result from granting it at such a late date (*id.* at 50).

3. The court of appeals affirmed (Pet. App. 52-55). It upheld the district court's conclusion that the United States had adequately represented petitioners' interests. Further, as an independent ground for denying intervention, the court of appeals concluded that petitioners had failed to satisfy the timeliness requirement of Rule 24, Fed. R. Civ. P., because they had waited for more than four months —until the day school opened —before challenging the consent decree (Pet. App. 54-55).

ARGUMENT

Petitioners' contention (Pet. 14-32) that the court of appeals erred in denying them intervention is without merit.[1] The court properly applied Fed. R. Civ. P. 24 in determining that petitioners failed to act in a timely fashion and that their interest was adequately represented by the United States.[2] The decision does not conflict with any decisions of this Court or other courts of appeals and raises no legal issue of general importance that merits review by this Court.

1. The court of appeals correctly concluded (Pet. App. 54-55) that petitioners' attempt to challenge the consent decree was untimely. Petitioners waited more than four months after approval of the decree before challenging it.

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[1]Petitioners appear to argue in this Court (Pet. 19-22) that it was error for the district court to treat their lawsuit as a motion to intervene. This contention was raised for the first time on rehearing, and therefore it was never addressed by the court of appeals. Accordingly, there is no reason for this Court to consider it now (see, *e.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977)), particularly since petitioners advance no cogent reason why the district court erred in this respect.

[2]The failure to meet one of the four requirements of Rule 24(a)(2) is sufficient reason to defeat intervention as of right under that Rule. See *NAACP* v. *New York*, 413 U.S. 345, 369 (1973). Here, petitioners fail to meet two requirements —timeliness and showing inadequate representation.

The court of appeals correctly found (*id.* at 55) that petitioners "should have filed within days of the April 17 order, if not sooner; there was no excuse for waiting till the school year began, so that if the motion had been granted the implementation of the decree would have been delayed." The court's conclusion simply followed this Court's repeated injunction that an applicant for intervention must act promptly in alleging that its interests have not been represented adequately. See *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977); *NAACP* v. *New York*, 413 U.S. 345 (1973).

The details of the consent decree were extensively publicized as early as December 1980. Petitioners must be charged with knowledge of any alleged inadequacy of representation at least when the final consent decree embodying the desegregation plan was made public in April 1981. They offer no excuse for delay. Permitting intervention on the first day of school would have unfairly prejudiced the parties to the decree and the students of South Bend. See *NAACP* v. *New York*, 413 U.S. at 369.

2. The court of appeals also correctly affirmed the district court's holding that the United States adequately represented petitioners' interests. It should be presumed that the United States adequately represented petitioners' interests in the litigation since they both had the same objective —desegregation of the South Bend schools.[3] This is particularly so when the government is charged by law with representing the interests involved. See *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F.2d 501, 505 (3d Cir.), cert. denied, 426 U.S. 921 (1976). Petitioners have made no showing of gross negligence, bad faith, or collusion that

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[3]Petitioners' differences with the United States lie in the choice of means to accomplish that end, rather than in a divergence of interests.

would rebut this presumption. See Pet. App. 53-54; *id.* at 49; *United States* v. *Board of School Commissioners*, 466 F.2d 573, 575 (7th Cir. 1972), cert. denied, 410 U.S. 909 (1973). Compare *Trbovich* v. *UMW*, 404 U.S. 528, 538 (1972) (Secretary of Labor held to be inadequate representative where statute imposes upon him "the duty to serve two distinct interests * * *").

Apparently, petitioners' allegation of collusion rests solely on the fact that the parties entered into a consent decree (see Pet. 20-21). A consent decree, however, is recognized as the preferred method of resolving school desegregation litigation "because the spirit of cooperation inherent in good faith settlement is essential to the true long-range success of any desegregation remedy." *Armstrong* v. *Board of School Directors*, 616 F.2d 305, 318 (7th Cir. 1980); see also *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). The decision of the parties to compromise their dispute surely cannot sustain an allegation of collusion.

Nor have petitioners alleged facts that demonstrate that the United States failed competently to represent their interest in a lawfully desegregated school system. Petitioners complained that the closing of certain public schools and the conversion of others to middle or alternative schools under the consent decree was unconstitutional, unwise, and irrational (Pet. App. 49). These contentions amount to the type of disagreement with discretionary choices regarding the best means of desegregating a dual school system that have consistently been found insufficient to support intervention as of right. See *Pate* v. *Dade County School Board*, 588 F.2d 501 (5th Cir.), cert. denied, 444 U.S. 835 (1979); *United States* v. *Perry County Board of Education*, 567 F.2d 277 (5th Cir. 1978); *Hines* v. *Rapides Parish School Board*, 479 F.2d 762 (5th Cir. 1973). Petitioners' allegations simply fail to overcome the presumption of adequate representation that attaches when the

United States and a would-be intervenor have the same ultimate objective. See, *e.g.*, *United States Postal Service* v. *Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). Indeed, the very desegregation plan that petitioners allege is unconstitutional was previously found to be "well within the Constitution of the United States and * * * the state statutory authority of the defendant school board." *United States* v. *South Bend Community School Corp.*, 511 F. Supp. 1352, 1361 (N.D. Ind. 1981).

Finally, petitioners had an unusually extensive opportunity to present their views regarding the desegregation plan to both the United States and the school board. As the district court found (Pet. App. 46):

> The school board enlisted community support for the development of the new student assignment plan. A Citizen's Advisory Committee was formed and over 300 citizens volunteered to serve on subcommittees. Subcommittees met over 150 times between February and December 1980 and nearly 200 people actively participated in the meetings. All meetings were open to the public and were given extensive newspaper publicity.

In addition, from December 1980 through February 1981, the school board held 12 public meetings regarding the proposed plan, at which members of the public were invited to speak. Petitioners therefore have had considerable opportunity to air their views and to have them considered by the parties in formulating the consent decree. Petitioners' disagreement with the final balance struck between competing interests in formulating the consent decree does not entitle them to intervention as of right. See, *e.g.*, *Pate* v. *Dade County School Board, supra.*[4]

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[4]Petitioners' contention (Pet. 16) that the court of appeals should have remanded the case to the district court to hold an evidentiary hearing on the intervention is also without merit. Because petitioners'

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSAY SILVER
WILLIAM R. YEOMANS
Attorneys

MARCH 1984

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complaint failed to allege facts that, if true, would have required the district court to grant the intervention, the complaint correctly was dismissed without an evidentiary hearing. Because petitioners' allegations amount only to disagreement with particulars of the consent order regarding the closing of certain schools and changes in the functions of others, it is clear from the face of the complaint that they seek to challenge decisions regarding how best to desegregate the South Bend school system, rather than constitutional deficiencies in the plan. Dismissal without an evidentiary hearing of a facially inadequate attempt to intervene plainly does not deprive the applicant for intervention of due process. See *Codd* v. *Velger*, 429 U.S. 624 (1977). Moreover, a court may dismiss without hearing a petition to intervene that is untimely on its face, as this one was. See *NAACP* v. *New York, supra*; *United States* v. *Louisiana*, 669 F.2d 314 (5th Cir. 1982).

For these reasons, petitioners' allegation of a conflict in the circuits based on *Adams* v. *Baldwin County*, 628 F.2d 895 (5th Cir. 1980), is erroneous. Although *Adams* states that the preferred procedure is to hold a hearing on a motion to intervene, the subsequent decision in *United States* v. *Louisiana, supra*, establishes that it is not the rule in the Fifth Circuit that a hearing is required when a motion to intervene is facially insufficient.

DOJ-1984-03

Office - Supreme Court, U.S.
FILED
MAR 27 1984
ALEXANDER L. STEVAS,
CLERK

Number 83-915

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

Mary Laura Brookins & al.,
Petitioners,

versus

South Bend Community School Corporation & al.

and

United States of America,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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Number 83-915

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

MARY LAURA BROOKINS & al.,
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versus

SOUTH BEND COMMUNITY SCHOOL CORPORATION
& al.

and

UNITED STATES OF AMERICA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

NEW ISSUES RAISED BY A RESPONDENT

1. Reality of Cause of Action in Complaint alleging new, intentional, massive, enduring and inter-system discrimination in public education.

2. Timeliness in alleging discrimination in public education.

3. Preservation of issue of Court's refusal to process a Complaint.

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ARGUMENT

1. Petitioners allege discrimination in public education.

The most fundamental new issue raised by the Defendants[1] is not set out but is assumed. The Brief in Opposition is structured as if the Plaintiffs (re-styled, over objection, by the court below as "Petitioners for Intervention") had not filed a Civil Rights Complaint alleging that the South Bend School Corporation was discriminating in public education, was actually engaged in re-segregation, and was putting in place a massive and pervasive program of site elimination and site retention (in harmony with an adjacent White school system's program of school building) intended to lock in the separation of the races and turn back, insofar as possible, the increasing residential integration in the City of South Bend, while insulating a sister municipality and the surrounding county from residential and school integration.[2]

This assumption by the Defendants is consistent with the shared position, the effectively collusive position of the School System and the Justice Department below. Not only did they not address or show the slightest concern over the Plaintiffs' allegations or the exhibits attached to their complaint; they took the position that the gravity of the

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1. Only the Justice Department Defendants filed a Brief in Opposition. The School System Defendants declined to file a Brief, noting to the Clerk that the Department would present their issues.

   The Department wrongly approved a school segregation plan under the guise of a desegregation plan by apparently only looking at the temporary, busing statistics without studying the remainder of the plan, particularly the relevant demography and history.

2. As if corroborating the BROOKINS allegations the City of South Bend's Human Rights Commission on 8 February, 1984, issued a report showing the following pattern in South Bend's index of residential segregation: 1940, 83.4%; 1950, 86.4%; 1960, 85.8%; 1970, 80.3%; 1980, 66.2%. However, the report also noted that the surrounding county, including the adjacent City of Mishawaka to the East, remained almost exclusively White. There is a significant coincidence between the areas of increasing residential, racial integration between 1970 and 1980 and the areas from which the School Corporation removed public grade schools in 1981.

BROOKINS allegation of an unconstitutional segregation plan (which was also waste and constructive fraud) and the exhibits which showed it to be massive and pervasive were irrelevant[3]. Now, prior to the record being before this Honorable Court, the Defendants presume the position that there never was a Complaint alleging unconstitutional conduct in order to state their position.

The Complaint, however, unambiguously alleges intent to establish a dual system and lock in separation of the races[4].

Once identified as Petitioners for Intervention, though objecting by motion and memorandum on October 22, 1981, to this identification[5], the Plaintiffs as Petitioners for In-

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3. A copy of the Appellate Appendix containing statistics and maps has been lodged with the Clerk of this Court by the Petitioners.

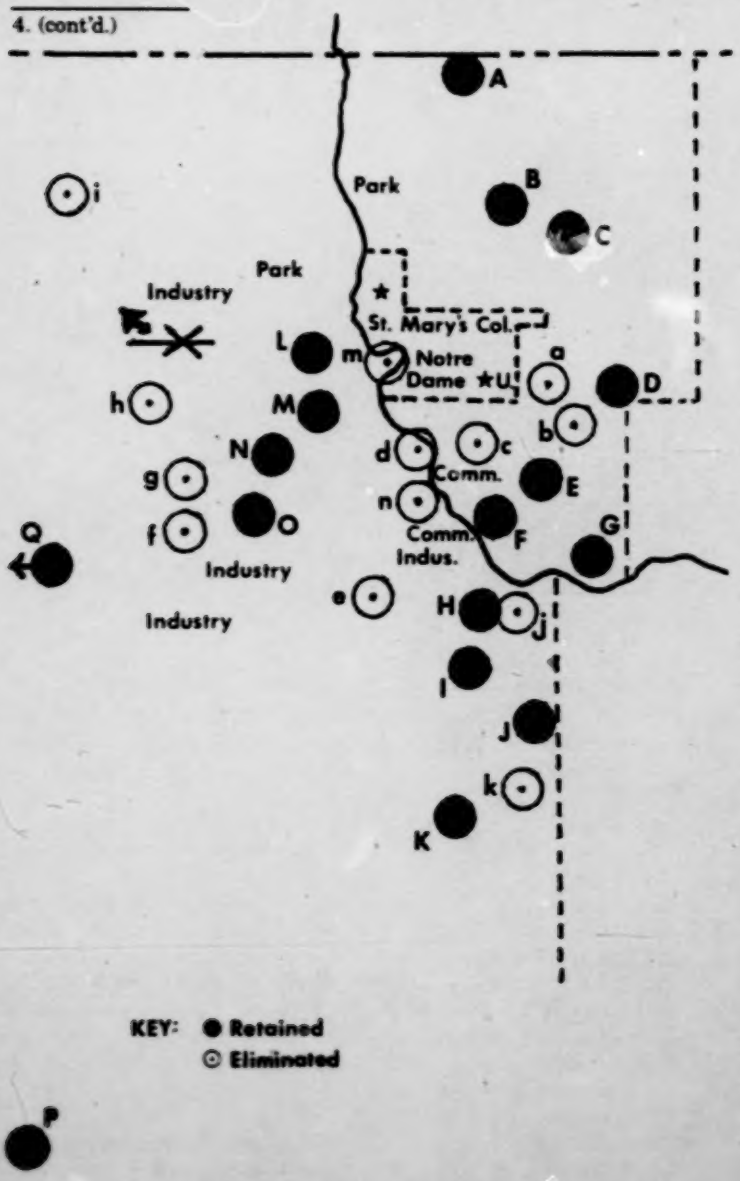
4. The general character of the issues raised and detailed by exhibits and the public record of land use is graphically summarized in this map of the grade school sites retained by the School System, marked with solid black disks and capital letters, and the school sites closed or changed to non-neighborhood use marked with open circles. On the East is the boundary of the Penn-Harris-Madison and Mishawaka systems' abutment to the South Bend School System, both Eastern systems being nearly exclusively White and both apparently sending Black students to the South Bend schools. Also shown are the barrier land uses adding to the isolation of the Black (and Hispanic — identified as White by the School System) pocket in Western South Bend, which the School System Defendants have dramatically completed.

   The percentage of Black students in each school shown, as of September, 1980, was, among grade schools retained: A, 0.41%; B, 6.14%; C, 0.15%; D, 11.48%; E, 30.24%; F, 23.91%; G, 7.11%; H, 59.15%; I, 7.46%; J, 5.30%; K, 1.65%; L, 44.08%; M, 48.17%; N, 83.72%; O, 63.82%; P, 0.78%; Q, 3.93%, and among grade schools closed or changed in use: a, 2.78%; b, 5.89%; c, 89.42%; d, 24.1%; e, 59.34% in a neighborhood 20% quod gerrymandering; f, 23.56%; g, 43.6%; h, 12.15%; i, 5.67%; j, 15.67%; k, 3.4%; and other schools closed: m, 39.41%; n, ?%. E and F are in wealthy areas while L and M are in the area of greatest Black population growth; under the "Plan" Black students are bused from near A to L.

5. A copy of the motion and memorandum are lodged with the Clerk of this Court.

tervention continued to point to the same fundamental, constitutional violations, to the same "frustra(ion of the). . . goal of a unitary school system" (GRAVES v. WALTON, 91 FRD 457, 474 (D.C. Ga., 1981), PATE v. DADE COUNTY SCHOOL BOARD, 588 F2d 501, 503 (5th Cir., 1979),

4. (cont'd.)



UNITED STATES v. MARION COUNTY SCHOOL DISTRICT, 590 F2d 146, 149 (5th Cir., 1979), UNITED STATES v. PERRY COUNTY BOARD OF EDUCATION, 467 F2d 277, 279 (5th Cir., 1978), JONES v. CADDO PARISH SCHOOL BOARD, 487 F2d 1275, 1277 (5th Cir., 1973), HINES v. RAPIDES PARISH SCHOOL BOARD, 479 F2d 762, 765 (5th Cir., 1973)[6], cf. ADAMS v. BALDWIN COUNTY BOARD OF EDUCATION, 628 F2d 895 (5th Cir., 1980)[7], SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, 402 U.S. 1, 20-21, 91 S.Ct. 1267, 1278-1279, 28 L Ed 2d 554, 569-570 (1971), CLARK v. BOARD OF EDUCATION OF LITTLE ROCK, 449 F2d 493, 499 (8th Cir., 1971), KEYES v. SCHOOL DISTRICT NO. 1, DENVER, COLO., 413 U.S. 189, 195-198, 93 S.Ct. 2686, 2691-2693, 37 L Ed 2d 548, 556-557 (1973), UNITED STATES v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, 494 F 2d 81, 87 (7th Cir., 1973), MCPHERSON v. SCHOOL DISTRICT NO. L86, SPRINGFIELD, ILLINOIS, 426 F. Supp. 173, 188 (S.D. Ill., 1976), PENICK v. COLUMBUS BOARD OF EDUCATION, 429 F. Supp. 229, 240-241, 252-254, 255, 259 (S.D. Ohio, E.D., 1977), COLUMBUS BOARD OF EDUCATION v. PENICK, 443 U.S. 449, 462, 99 S.Ct. 2941, 2949, 61 L Ed 2d 666, 680 (1979), UNITED STATES v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, 506 F. Supp. 657, 671 (S.D. Ind., 1979).

In the instant case the Plaintiffs and Petitioners for intervention illustrated the scale and depth of the Constitutional problem by filing supplementary exhibits (as they

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6. In Indianapolis, while potential, White intervenors were barricaded from intervention, Black students were granted intervention without indication of having to show any inadequacy of the "representative" (UNITED STATES v. BOARD OF SCHOOL COMMISSIONERS OF INDIANAPOLIS 466 F 2d 573, 575 (1972), presumably not simply on the basis of race but rather on the basis of the reason for intervention which, in turn, was affected by race.

7. UNITED STATES v. LOUISIANA, 669 F2d 314 (5th Cir., 1982) is not yet a true exception, because in that case the NAACP failed to use a previous grant of intervention and then sought a new one.

were prepared) during the long wait for rulings on the threshold motions[8].

Until now, there has been no doubt that complaints regarding public school discrimination must be heard[9], whether processed as simple complaints or processed as Court directed Petitions for Intervention, as in the Fifth Circuit.

2. The BROOKINS Complaint was timely.

Given that this action was filed as a Complaint against discrimination in public education, against current violations of Civil Rights, under 42 U.S.C. 1983 and Amendment XIV, inter alia, it was both ripe and timely.

That the Court, on the School System's Motion, restyled the BROOKINS Complaint as a Petition for Intervention did not make the filing untimely. Rather, it placed rigid restrictions on any application of timeliness requirements to Court created Petitioners for Intervention (Cf. the irrelevance of nine years in ADAMS v. BALDWIN.)[10], lest due process be denied.

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8. There was no announced stay though the Department wished one. The Department expressed not the slightest concern over the gravity of the allegations or the serious problems illustrated by the exhibits.

   There is no factual support for the statement (Brief in Opposition, p. 7) that the United States gave any "opportunity to...petitioners...to present their views." Moreover, the Department repeats the serious legal error made below in alleging that such an "opportunity" is a legally supportable substitute for a Court. Nothing grants jurisdiction to either the Department or the Board to decide prospectively a 42 U.S.C. 1983 action filed against them in a Federal Court.

   The finding by the District Court that the plan was "well within the Constitution...." (Ibid.) was made without evidentiary hearing, was made without the safeguards of a compromised class action, and, in any case, cannot bind the BROOKINS Plaintiffs (SAM FOX PUBLISHING CO. v. UNITED STATES, 366 U.S. 683, 689-690, 6 L Ed 2d 604, 609-610, 81 S.Ct. 1309, 1313 (1961)

9. CODD v. VELGER (Brief in Opposition, p. 9) is not an exception. This Court, divided, found there was no cause or case to be heard.

10. This, of course, points back to the conflict between the Circuits discussed in the instant Petition for Writ of Certiorari, as well as the fundamental right to be heard.

Moreover, neither the Department nor the Appellate Court recognized "that '(a)lthough in other litigation the Court's decision virtually marks the end of the case, in a school desegregation action it is scarcely the beginning.'" BROWN v. BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, 84 FRD 383, 403 (D.C. Kan., 1979). Nor did they recognize that in a desegregation case that since the "'issues the new group sought to represent and the ways in which the goal of a unitary school system had allegedly been frustrated...were (not) currently known to the Court...(and) determined...(on) a significant claim..., intervention would be allowed' (HINES v. RAPIDES PARISH SCHOOL BOARD, 479 F2d 762, 765 (5th Cir., 1973)...(and) would not disrupt the orderly processes of the Court" (BROWN v. BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, 84 FRD 383, 404 (D.C. Kan., 1979) and should not be judged untimely (Idem, 398-405).

The prejudice against the Plaintiffs or Petitioners for Intervention is, of course, extreme. Fundamental rights would be denied and the orderly process of the Court in hearing Civil Rights complaints would be brought to a halt[11], if Civil Rights Plaintiffs were required to either precipitiously rush into Court even without counsel or forever surrender fundamental, Constitutional rights.

In any case, a Civil Rights action is ripe and timely on each day of the violation and, if the Court restyles a valid complaint as a Petition for Intervention, it may not then retroactively apply rules for a situation it has imposed on previously pristine Plaintiffs.

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11. Lay people, outside of closed commercio-governmental planning discussions cannot be expected to understand all of the long range implications of a "complex and complicated socio-legal plan" (Brief of School System, p. 21), especially when the school system is engaged in a massive public relations campaign proclaiming its good intentions. (Cf. Petition For Writ of Certiorari, p. 26, #19.)

3. The Petitioners have consistently sought to have their complaint processed.

Continuously the Plaintiffs or Petitioners for Intervention have insisted on their right to due process, their right to be heard, a right so fundamental that it should not have been subject to doubt. They have never surrendered that right, developing the exposition of their rights if they were to be treated as Petitioners for Intervention under Fifth Circuit Law, while repeating their request for alternative relief, that is, restoration of themselves to the docket as simple Plaintiffs with their own case, in their formal prayer to the Appellate Court[12].

Moreover, the Appellate Court committed new error. While insisting that the Plaintiffs pursue a separate case, the Appellate Court refused to recognize that the Plaintiffs or Petitioners always wanted to pursue their own case and never "chose to piggy-back on the Department." The Appellate Court persisted in this apprehension even after request for correction on rehearing, and that error alone is a basis for granting Certiorari.

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12. In light of the Departments' argument (Brief, p. 3) questioning these Petitioners have lodged with the Clerk of this Court copies of their motion for relief from the exparte Order in the District Court as well as their Appellate Brief, their Reply Brief and their Request for Rehearing. UNITED STATES v. LOVASCO is completely inapposite because case LOVASCO never preserved the error in question nor raised it in any fashion until argument in the United States Supreme Court argument.

CONCLUSION

For whatever reason, the Justice Department does not appear to share the objective, which the BROOKINS Plaintiffs or Petitioners for Intervention have, namely, remedying a massive scheme for locking separation of the races into the future of South Bend, and the Department evidently does not share the Petitioners' interest in due process or in getting evidence of such a segregation program before the District Court for adjudication. Rather, they appear, as a practical matter, to be shielding the Defendant School System from judicial scrutiny. The Department is a practically adverse party providing no assistance to those towards whom it appears to assert a Guardian-Ward relationship and actively working to deny the Wards their right to be in Court on matters of fundamental Constitutional right as full-fledged Citizens of this Country.

The fundamental right of the Petitioners to be heard must be vindicated, not only to preserve their own rights but to avoid a mischievous precedent which would both make new governmental segregation easier and disrupt other substantive areas of law.

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NO. 83-915

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARY LAURA BROOKINS, ET AL.,
PETITIONERS,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION,
ET AL.,
AND
UNITED STATES OF AMERICA,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF BEVERLIE J. BECK AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE

Consent to Beverlie J. Beck's filing of this brief as amicus curiae has been obtained from all parties. Copies of letters from the parties' attorneys indicating this consent have been filed with the clerk of this Court.

Beverlie J. Beck is President of the South Bend City Council of which she has been a member for four years. Much of her time on the council has been spent working with and for neighborhood groups. As a member of the City Council she is personally aware of the many years of effort and many dollars of community Development money it took for South Bend to be able to point with pride to its numerous healthy, naturally-integrated neighborhoods which had forgotten about "white flight" many years ago. Ms. Beck built her home and lives in such a neighborhood.

Beverlie Beck is in her twenty-ninth year as an educator in the South Bend public schools. She taught at an integrated neighborhood school which was closed to normal neighborhood use by the desegregation plan embodied in the consent decree entered into by the Justice Department and the South Bend Community

School Corporation.

Beverlie Beck has been interested in integration issues since 1957 when she attended a summer workshop at the University of Notre Dame. She believes in integration. She is not opposed to busing when it is needed. She objects to needless busing, especially when it will only frustrate the goal of achieving integration and seriously undermines the public policy of ending discrimination in housing.

As an elected representative of South Bend, Ms. Beck grieves that what could have been a simple plan for integrating an area of considerable good-will has instead been replaced by a plan which can only prove deadly for her city's growth and expansion. As an educator who believes in integration and as a resident of an integrated neighborhood, she is gravely concerned that a plan was adopted and approved by a federal court which not only

promotes school segregation but promotes residential segregation as well.

Beverlie Beck believes that if the District Court had given Petitioners an opportunity to present their evidence in opposition to the plan, it would not have been approved by the Court.

SUMMARY OF ARGUMENT

Petitioners have been denied their day in court. This result cannot stand unless the procedural due process guaranteed by our Constitution is made a dead letter.

Amicus submits that this case reflects in part the confusion in the lower federal courts as to how to permit and encourage voluntary settlements of desegregation cases while preserving and protecting constitutional requirements and the rights of those adversely affected by but not a party to the settlement. What the Seventh Circuit has done in this case is to totally ignore the fact that a tension exists between

voluntary settlements and the rights and interests of individuals and communities. In ignoring this fact, this circuit not only afforded Petitioners a total lack of due process, it also seriously undermined the value thought to be inherent in a voluntary settlement of a school desegregation case.

Furthermore, this result is in conflict with the law of the Seventh Circuit as well as the law of other Circuits. More importantly, perhaps, the result of this case seriously undercuts the constitutional policy requiring the desegregation of our nation's schools and undermines community efforts, pursuant to federal and local policy, toward ending discrimination in housing, and thereby encouraging integration in residential patterns.

If school integration is truly this country's goal, courts must consider with care the impact a remedy is likely to have

on resegregation. Special care must be taken in the context of voluntary settlements of school desegregation cases which necessarily involve the compromise of civil rights. If voluntary settlements are to provide the benefits courts cite to justify their use, that is, the community cooperation they inspire, standards must be set to ensure that objectors' interests and the interests of the community as a whole are considered by the courts. At the very least, amicus submits, courts must provide an opportunity for objectors to be heard.

Therefore, amicus urges this Court to grant the certiorari petitioned for in this case. Only review by this Court can ensure that no other individuals or communities suffer the egregious wrong done Petitioners and the City of South Bend. Only this Court can ensure that Petitioners get their day in Court.

ARGUMENT

This case represents a new chapter in the area of school desegregation. Nationwide, efforts have moved from the de jure context to the de facto situation, from the South to the North and West, and from court-imposed remedies to voluntarily-settled desegregation plans. Such changes call for a new judicial sensitivity to the unique issues they present. Although the goal is the same--integrated education--the vehicles used for reaching this goal have changed. So must the nature of the judiciary's vigilance in protecting civil rights adapt to these changes.

One such change which calls for increased judicial vigilance is the move from court-imposed remedies in fully-litigated cases to voluntary settlements of desegregation cases. Such voluntary settlements can occur in the class action suit context or in the procedural context

of a consent decree entered in a suit brought by the Justice Department against a local school board.

Voluntary settlements are favored by the courts because "the spirit of cooperation inherent in good faith settlement is essential to the true long-range success of any desegregation remedy." Armstrong v. Board of Sch. Directors, etc., 616 F.2d 305, 318 (7th Cir. 1980).

> A remedial decree reached through agreement between the parties may, because of the community cooperation it inspires, more effectively implement the constitutional guarantee of equal protection than a seemingly more stringent court-ordered remedy which the community views as imposed upon it from the outside.

Id. Courts should be extremely sensitive to the possibilities for abuse, though, where a compromise of the civil rights of a class is proposed. Id., at 317.

Therefore, in class action desegregation cases, hearings on proposed reme-

dies are almost universally held, and it may be an abuse of discretion not to conduct one. Mendoza v. United States, 623 F.2d 1338, 1348 n. 8 (9th Cir. 1980). Class members are notified of the proposed settlement and of the fairness hearing at which they and all interested persons have an opportunity to be heard. Armstrong, supra, at 314.

The purpose of such a hearing is to insure the opportunity for all relevant facts and objections to be placed before the court. The trial court must have sufficient facts before it to intelligently evaluate the settlement proposal. Mendoza, supra, at 1348; Armstrong, supra, at 314. The hearing assures that there are no unrepresented interests which are unfairly treated by the settlement. Absent class members are afforded an opportunity to come forward and make the court aware of any undisclosed inadequacies.

Mendoza, supra at 1348.

The Seventh Circuit in Armstrong, supra, went further to establish guidelines to ensure that federal courts reviewing class action settlements give due consideration to the public interests implicated in the suits before them. First, the importance of the substantive claims asserted in civil rights cases requires that both district courts and courts of appeals apply settlement principles with particular care and state their reasoning with particular clarity. Second, in considering a settlement the district judge must give constitutional claims the close scrutiny they deserve. Furthermore, no settlement should be approved which either initiates or authorizes the continuation of clearly illegal conduct. Armstrong, supra at 319.

The principles and guidelines established by the courts to govern the settlement of class action desegregation suits should be no less applicable in the

settlement of non-class action desegregation suits. Just as the named class representatives are presumed to adequately represent all class members in the class action context, so in the non-class action context where the Justice Department brings suit is it presumed to adequately represent the interests of the public. Yet because representative suits carry with them inherent dangers of conflict and compromise of absentee interests, courts in both contexts must be well informed of the views of objectors, and serve as a guardian of absentee interests. Mendoza, supra at 1346. If the settlement embodied in a consent decree entered into by the Justice Department and a local school board is to foster the same cooperative desegregation spirit as that thought to stem from class action settlements, procedures must be adopted which ensure that the interests of all those affected as well as the interests of

the community as a whole be heard and considered. Only maximum public participation will inspire community cooperation.

In the present case a voluntary settlement was reached by the Justice Department and the South Bend Community School Board (hereinafter SBCSC) in a non-class action suit instituted by the Justice Department. This settlement was embodied in a consent decree which was approved by the District Court based only on information provided it by the SBCSC. When two different groups sought intervention to raise their objections to the desegregation plan, they were denied intervention because it was presumed that the Justice Department and SBCSC adequately represented any objectors' interests. Petitioners then raised their objections to the plan in a separate lawsuit. In their class action suit Petitioners raised substantial constitutional claims. They

alleged facts which, if they had been given an opportunity to prove, would have shown that the desegregation plan adopted by the school board was unconstitutional, unlawful, against public policy and unreasonable. Petitioners were never afforded this opportunity. Petitioners were never given a trial on the merits of their claims. Nor were they even given an opportunity to be heard or present any evidence supporting their claims. This was because their suit, on the motion of the defendant SBCSC, was consolidated with the Justice Department's suit and Petitioners were thereafter treated as petitioners for intervention. No authority or justification for treating Petitioners as would-be-intervenors was given by the District Court and the Court of Appeals refused to rule on the appropriateness of this move. (Indeed, the Court of Appeals was under the mistaken impression that Petitioners had sought to have their complaint treated

as a petition for intervention). Yet it was this procedural step, coupled with the District Court's failure to apply the settlement principles and guidelines enunciated by the Seventh Circuit in Armstrong, supra, which worked to deny Petitioners any meaningful access to the courts to seek redress of the violation of their civil rights.

The District Court may have been persuaded by Fifth Circuit law which requires objectors to consent decrees entered in school desegregation cases to seek intervention. Adams v. Baldwin County Bd. of Educ., 628 F.2d 895 (5th Cir. 1980). Even if intervention be determined the proper way for objectors to consent decrees to proceed, due process requires they be given an evidentiary hearing on the question of adequacy of representation. Adams v. Baldwin County, supra at 897; Jones v. Caddo Parish School Bd., 704 F.2d 206,222 (5th Cir. 1983).

In the present case the District Court allowed no such hearing. Furthermore, a statement by the Court of Appeals in its opinion in this case indicates that the Seventh Circuit does not limit objectors in school desegregation consent decree cases to the status of petitioners for intervention. See also, United States v. Board of Ed. of City of Chicago, 88 F.R.D. 679, 685 (N.D. Ill, E.D. 1981). Yet when Petitioners instituted an independent lawsuit the District Court construed their complaint as a petition for intervention. If this error goes unrecognized and stands uncorrected this case stands for the proposition that a school desegregation plan devised through voluntary means and entered in a consent decree is immune from constitutional attack.

Petitioners in the District Court sought to show that the desegregation plan adopted by the SBCSC involved the removal

of eleven out of twenty-eight grade schools the vast majority of which were either already racially balanced or easily capable of being racially balanced with minor changes. Furthermore, the plan carefully preserved the heavily black and heavily white schools leading to a situation where extensive busing was needed to achieve racial balance. Therefore, the entire integration plan will collapse when the artificial paste of extensive busing is removed and South Bend will be left a city polarized as never before.

Petitioners also offered evidence from an expert witness to the effect that the general consensus among experts on the subject is that any school desegregation plan that fails to exempt from busing neighborhoods and schools that approximate the district-wide racial composition is likely to increase rather than decrease the overall level of racial segregation in

the community undermining existing integrated neighborhoods and reducing the incentives to achieve integration elsewhere.

These facts, coupled with the fact that school closings in the past twenty years of South Bend's history have almost always involved schools which were becoming increasingly integrated, and the fact that the desegregation plan requires 150% more blacks be bused compared to 4% more whites, could clearly indicate that an invidious discriminatory purpose was a motivating factor behind the adoption of this plan. Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 266 (1977). Yet the District Court undertook no inquiry, let alone a "sensitive inquiry" as demanded by Arlington Heights, supra, into the evidence of intent offered by the Petitioners.

In its haste to guarantee that the local school board be allowed to orderly

and efficiently (achieve) final and complete implementation of the Desegregation Plan" and to protect the school board from spending "substantial time and expense defending the Plan," the District Court was derelict in its duty to protect the constitutional rights of the persons represented by Petitioners, as well as the constitutional rights of all other persons impacted by the South Bend public school system.

As stated by a sister court within the Seventh Circuit, in response to the "implication, expressed more than once by counsel for the local school board," in a procedural context identical to this, that the Court play only a limited role:

> This Court does not view itself as a passive receptacle for the Board's desegregation plan, to respond in a Pavlovian way only if the bell is rung by a stated disagreement between the Board and the United States. It has not abdicated its constitutional responsibilities, and if the litigants were to agree on a plan that

> did not conform to the Constitution this Court would reject that plan and send the parties back to the drawing board.

United States v. Board of Ed. of City of Chicago, supra at 687. (Original emphasis) (Footnotes omitted). The District Court in that case noted that the Assistant Attorney General assigned to the case recognized that to the extent third parties wished to be heard, they would have that right, not only before the school board, but before the Court as well. Id. To the contrary, in this case, the District Court felt it was sufficient that Petitioners "ha(d) had (their) day before the Board of School Trustees."

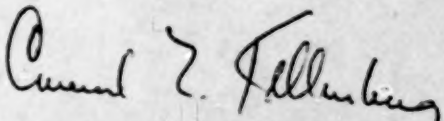
District courts cannot delegate to local school boards the duty and responsibility of determining the constitutionality of the plans they submit. Yet that is the consequence of the District Court's actions in this case. Such an egregious constitu-

tional wrong cannot be allowed to stand.

CONCLUSION

If voluntary desegregation efforts are to inspire the community cooperation thought to justify their use, third parties must have a meaningful opportunity to be heard. District courts cannot allow themselves to become vehicles for local school boards to use to reestablish dual school systems. Such a result is possible if courts, such as the District Court in this case, deny objectors a hearing on their constitutional claims. For the reasons discussed in this brief, amicus respectfully requests this Court to grant the writ of certiorari petitioned for in this case.

Respectfully submitted,



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